Aspects of Corporate Governance in South African Public Higher Education Institutions

by

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“ASPECTS OF CORPORATE GOVERNANCE IN SOUTH AFRICAN PUBLIC HIGHER EDUCATION INSTITUTIONS”

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My proefskrif word met liefdevolle herhinneringe opgedra aan my ma, Annette van Schalkwyk (ter nagedagtenis). Baie dankie vir al jou liefde, gebede en ondersteuning deur al die jare. Baie dankie vir die goeie waardes wat jy my geleer het en die uitstekende voorbeeld wat jy vir my was. Ek mis jou elke dag.

Summary

The right to education is entrenched in the Constitution of the Republic of South Africa, 1996. The Constitution, together with various policy documents, provides guiding principles for the transformation of higher education in South Africa. Several universities were placed under administration, before and after the attainment of democracy in South Africa. The independent assessors reports on these institutions have one thing in common, namely that they point out poor administration and ineffective corporate governance practices. Despite many commendable initiatives by Government since 1994 to improve an apparently flawed higher education system, some aspects could be enhanced further, especially concerning corporate governance and governance accountability.

Council members and the executive management of higher education institutions are subject to common law fiduciary duties and duties of care and skill. However, their accountability for breaches of these duties is not always clear and is seldom enforced. There is a need to balance effective accountability and the exercise of discretionary powers that are integral to effective governance and management. This thesis considers how corporate governance and compliance in higher education can be improved further, taking into account various legislative changes to the Higher Education Act 101 of 1997, direction provided by the Companies Act 71 of 2008 and the Banks Act 94 of 1990 in respect of the regulation of directors' duties. An in-depth investigation into the relevant provisions of these Acts was not intended nor undertaken. Rather, the thesis draws from these Acts so that the problems concerning corporate governance in the higher education sector may be dealt with.

The regulation of higher education in the foreign jurisdiction of the State of Georgia in the United States of America and in the Canadian province of Ontario was also considered. Based on the research undertaken, specific amendments are proposed to the Higher Education Act of 1997 and the

Regulations for Reporting by Public Higher Education Institutions 2014, which are aimed at improving governance accountability and compliance in higher education.

Keywords: institutional autonomy; corporate governance; co-operative governance; government interventions; higher education institutions; public accountability; fiduciary duties; personal liability; directors; United States; Canada

Opsomming

Die reg op onderwys word in die Grondwet van die Republiek van Suid-Afrika 1996 verskans. Riglyne vir die transformasie van hoër onderwys in Suid-Afrika word in die Grondwet en verskeie ander beleidsdokumente vervat. Voordat en nadat 'Suid-Afrika demokraties geword het, is verskeie universiteite onder administrasie geplaas. Luidens die onafhanklike assessore se verslae, het hierdie instellings een ding gemeen gehad: swak administrasie en ondoeltreffende korporatiewe regering. Ondanks talle prysenswaardige stappe van die regering sedert 1994 om die probleme in die hoëronderwysstelsel te ondervang, kan bepaalde aspekte steeds verbeter, in die besonder korporatiewe regering en regeeraanspreeklikheid.

Raadslede en lede van die uitvoerende besture van hoëronderwysinstellings is verplig om hulle gemeenregtelike fidusiêre pligte en hulle sorgvuldigheids- en kundigheidsplig na te kom. Hulle verantwoordingspligtigheid in geval van pligsversuim is egter dikwels vaag en word selde afgedwing. Die juiste ewewig moet gevind word tussen doeltreffende verantwoordingspligtigheid en die uitoefening van diskresionêre magte wat onlosmaaklik deel is van doeltreffende korporatiewe regering en bestuur.

In hierdie tesis word gekyk hoe korporatiewe regering en nakoming in hoër onderwys verbeter kan word met inagneming van verskeie wysigings van die Wet op Hoër Onderwys 101 van 1997, riglyne in die Maatskappywet 71 van 2008 en in die Bankwet 94 van 1990 aangaande die pligte van direkteure. Geen grondige ondersoek na die toepaslike bepalings in hierdie wette is beoog of gedoen nie. Hulle word eerder gebruik om oplossings vir die probleme met korporatiewe regering in hoër onderwys te vind.

Hoe hoër onderwys in die Amerikaanse deelstaat Georgia en die Kanadese provinsie Ontario gereël word, is eweneens in ag geneem. Wysigings van die Wet op Hoër Onderwys van 1997 en die *Regulations for Reporting by*

Public Higher Education Institutions 2014, wat poog om verantwoordingspligtigheid en voldoening in hoër onderwys te verbeter, word voorgestel.

Sleutelwoorde: instellingsoutonomie; korporatiewe regering; samewerkende bestuur, regeringsingryping; hoëronderwysinstellings; publieke aanspreeklikheid; fidusiêre pligte, persoonlike aanspreeklikheid, direkteure, Verenigde State, Kanada

Ngamagama afinyeziwe

Ilungelo lokufunda liqukethwe uMthethosisekelo woMbuso waseNingizimu Afrika, wangonyaka ka 1996. UMthethosisekelo, kanye neminye imibhalo eyahlukahlukene yemigomo, inikeza umhlahlandlela wemigomo yokuguqulwa kwamaziko emfundo ephakeme eNingizimu Afrika. Amanyuvesi ahlukahlukene amiswa futhi, ngaphambili nangemuva kokuthola idemokhrasi eNingizimu Afrika. Imibiko yabaphenyi bamanyuvesi abazimele inophawu olufanayo, lokuthi iveza ukungahanjiswa kahle kohlelo lokuphatha kanye nokungalandelwa kwezingqubo zokuphatha amabhizinisi. Yize kunemizamo eminingi encomekayo evela uHulumeni kusukela ngonyaka ka 1994, imizamo yokuthuthukisa uhlelo lwemfundo ephakeme olwehlulekayo, ezinye zezimpawu zaqhubeka nokuqiniswa, ikakhulu lezo ezimayelana nokuphathwa kwamaziko kanye nokuziphendulela kwamaziko.

Amalungu omkhandlu kanye nesigungu sabaphathi bamaziko emfundo ephakeme bayaphoqeleka ukulandela umthetho ngokuthi benze imisebenzi ngokuthembeka okuyimisebenzi emayelana nokunakekela kanye namakhono okusebenza. Yize-kunjalo, ukuziphendulela kwabo uma bephula imithetho kaningi akucaci kahle kanti le mithetho ayivamisile ukuqiniswa. Kunesidingo sokulinganisa uhlelo olusebenzayo lokuziphendulela kanye nokusebenzisa amandla okuphatha onikezwe wona, okungamandla ayinsika ekuqiniseni uhlelo lokuhanjiswa kahle kwamaziko kanye nokuphathwa. Le thesis iqonde ekutheni ngabe uhlelo lokuphathwa kwamaziko kanye nokulandelwa kwemithetho emazikweni emfundo aphakeme kungathuthukiswa kanjani, uma kubhekwa izinguquko zomthetho ezahlukahlukene, kuMthetho 101 weMfundo Ephakeme ka 1997, uma kubhekwa indlela enikezwa uMthetho 71 weziNkampani ka 2008 kanye noMthetho 94 wamaBhange ka 1990 mayelana nomthetho wemisebenzi yabaqondisi. Akukaze kube nenhloso futhi kwenziwe uphenyo olujulile mayelana nemithetho efanele yale Mithetho. Kunalokho, ithesisi yencike phezu kwaleMithetho ukuze izinkinga ezimayelana nokuphathwa kwamaziko emkhakheni wemfundo ephakeme zidingidwe kahle.

Umthetho wemfundo ephakeme esiyingini somthetho sangaphandle se-*State of Georgia* ngase-*United States of America* kanye nasesifundazweni sase*Canada* ngase-*Ontario* nawo uye wabhekwa. Ngenxa yocwaningo olwenziwe, sekuye kwaphakanyiswa ukuthi kube nezinguquke ezithile eMthethweni weMfundo ePhakeme ka 1997 kanye naseMithethweni yokuBika yamaZiko eMfundo ePhakeme oMphakathi ka 2014, okuyimithetho ehlose ukuthuthukisa izinga lokuphatha okunokuziphendulela kanye nokulandela umthetho wemfundo ephakeme.

Amagama asemqoka: Igunya lokuziphatha; uhlelo lokuphathwa kwamaziko; uhlelo lokuphatha ngokuhlanganyela; imizamo kahulumeni yokutakula isimo; amaziko emfundo ephakeme; ukuziphendulela emphakathini; ukwenzaq imisebenzi ngokuthembeka; ukuphoqeleleka komuntu; abaqondisi; i-United States; i-Canada.

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The opinions expressed and the conclusions arrived at in this thesis are my own and should not be attributed to any of the institutions that assisted me with my research.

TABLE OF ABBREVIATIONS

AJLH	American Journal of Legal History
ALI	American Law Institute
AMEX	American Stock Exchange
BCL Rev	Boston College Law Review
Bus Law Rev	Business Law Review
Can Bus LJ	Canada Business Law Journal
CBCA	Canada Business Corporations Act
CHE	Council on Higher Education
CIPC	Companies and Intellectual Property Commission
CNCA	Canada Not-for Profit Corporations Act
CUT	Central University of Technology
Del J Corp	Delaware Journal of Corporate Law
DHET	Department of Higher Education and Training
HBU	Historically Black Universities
HESA	Higher Education South Africa
HEQC	Higher Education Quality Committee
HEQC	International Journal of Economic Development
IJTE	International Journal of Technology in Education
JEFS	Journal of Economic and Financial Sciences
JNGS	Journal for New Generation Sciences
JPA	Journal of Public Administration
MBCA	Model Business Corporations Act
MoI	Memorandum of Incorporation
NASDAQ	National Association of Securities Dealers Automated Quotation
NCHE	National Committee for Higher Education
NIHE	National Institute of Higher Education
NQF	National Qualifications Framework
NPHE	National Plan for Higher Education
NYSE	New York Stock Exchange
OECD	Organisation for Economic Co-operation Development
OCBA	Ontario Business Corporations Act
ONCA	Ontario Not for Profit Corporations Act
PELJ	Potchefstroom Electronic Law Journal.
SACJ	South African Computer Journal.
SAJAAR	South African Journal of Accountability and Auditing Research.
SAJHE	South African Journal of Higher Education.
SAJLR	South African Journal of Labour Relations.
SA Merc LJ	South African Mercantile Law Journal.
SAQA	South African Qualifications Authority
SAYIL	South African Yearbook of International Law.
SCC	Supreme Court of Canada
SEC	Securities Exchange Commission
SOX	Sarbanes-Oxley Act of 2002
SRC	Student Representative Council
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg.
TSAR	Tydskrif vir Suid-Afrikaanse Reg.

TSE	Toronto Stock Exchange
UCLA Law	University of California Law Review
UJ	University of Johannesburg
USA	United States of America
USAf	Universities South Africa
US Code	United States Code
USG	University System of Georgia
UWC	University of the Western Cape

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CHAPTER 1: INTRODUCTION AND BACKGROUND INFORMATION RELATING TO THE STUDY

1.1 INTRODUCTION AND BACKGROUND

1.1.1 Introduction

This study focuses on inadequate corporate governance practices and the absence of adequate accountability measures for breaches of their duties by Council members and executive management. Inadequate governance practices were pointed out in the independent assessors' reports, of several public higher education institutions that had been placed under administration after the attainment of democracy in South Africa.[1] Some of these institutions have been placed under administration more than once. The independent assessors' reports revealed some common perceptions: Councils were having difficulties in providing oversight and direction as well as taking responsibility for the overall governance of their institutions as required by the Higher Education Act of 1997;[2] the inability of both the Councils and the Vice-Chancellors of individual institutions to discharge their fiduciary duties towards their institutions; ineffective senior management, including the Vice-Chancellor of certain institutions; fraud and tender corruption; conflicts of interest between Council members and the procurement of services for the university; financial mismanagement; and unfair remuneration practices. It was also clear that there is insufficient accountability for members of executive management who allowed fraudulent behaviour or made decisions to the detriment of the institution.

The objective of the research is to review the South African higher education environment before and after the attainment of democracy, to compare corporate governance practices and accountability in South Africa

[1] These failures in governance are discussed more fully in Chapter 3, para 3.3.2 below.

[2] Section 27 of the Higher Education Act of 1997.

and selected foreign jurisdictions, and to consider guidelines provided by some South African statutes aimed at enhancing governance practices in other sectors. Based on this research, amendments to the Higher Education Act 101 of 1997[3] as well as the *Regulations for Reporting by Public Higher Education Institutions*[4] are proposed to improve regulatory governance practices and to strengthen accountability for their breaches in the higher education sector.

As stated above, the focus of this research will be to investigate corporate governance practices in public higher education institutions. It is, therefore, essential to understanding what constitutes corporate governance. There is no single or specific definition of corporate governance.[5] The *Fourth King Code of Corporate Governance* (*King IV*) defines it as "the exercise of ethical and effective leadership by the governing body towards the achievement of the following governance outcomes – ethical culture; good performance; effective control and legitimacy."[6]

1.1.2 Governance framework for public higher education institutions

The Higher Education Act of 1997, together with the *2014 Reporting Regulations*, and the institutional statute of each institution are the primary

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[3] Hereinafter referred to as the Higher Education Act of 1997.

[4] *Government Gazette* Nr. 37726 (GN. 588) 9 Junie 2014. Hereinafter referred to as the *2014 Reporting Regulations*. See Chapter 4, para 4.4.4 below for a discussion on these regulations.

[5] See Chapter 4, para 4.4.1 below for a discussion on corporate governance in general. The HIH Royal Commission (Owen Report), after the collapse of HIH Insurance limited define corporate governance as follows: "Corporate governance describes the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations. In light of this definition, the expression "corporate governance" embraces not only the models or systems themselves but also the practices by which that exercise, and control of authority are affected. See also Du Plessis J *et al*. *Principles of Contemporary Corporate Governance* 3rd ed (Cambridge University Press 2015) 4 - 5.

[6] *King IV* p. 11. *King IV* is discussed in Chapter 4, para 4.4.3 below.

documents that govern higher education institutions, including universities.[7] A higher education institution is a juristic person established in terms of section 20(4) of the Higher Education Act of 1997 and is governed by a Council established in terms of section 27, as well as the institution's institutional statute in terms of section 33 of the Act.[8] The Council is the highest decision-making body of a public higher education institution. The Department of Higher Education and Training (DHET) is the custodian of public higher education institutions[9] while the institution's executive management is tasked with its daily operations, administration and management.[10]

Chapter 4 of the Higher Education Act of 1997 provides for governance of public higher education institutions. However, it does not provide for a standard of conduct for Council members and members of executive management.[11] It also does not provide for the removal of Council members or declaring a Council member delinquent in certain circumstances. In the author's view, the Higher Education Act of 1997 lacks accountability measures and should be addressed. Recommendations in this regard are made in chapter 6 below.

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[7] The Higher Education Act of 1997 is discussed in detail in Chapter 2, para 2.2.3.

[8] Any reference to higher education institution within this thesis refers specifically to a public university. Higher Education also includes Further Education and Training (FET) colleges. This, however, might change with the introduction of the White Paper for Post-School Education Systems (hereinafter referred to as the *2014 White Paper*). This research will be limited to universities only.

[9]There are also other external stakeholders like the example, the Council of Higher Education (CHE) is discussed in Chapter 2, para 2.3.1 below.

[10] The legislative framework of a public higher education institution is discussed more fully in Chapter 2, para 2.3.1 below.

[11] See Chapter 2, para 2.2.3 for a discussion on the Higher Education Act of 1997.

1.1.3 Relevant company law and corporate governance

In terms of section 66 of the Companies Act of 2008, the board of directors of a company is responsible for its management.[12] The Companies Act of 2008 provides for stringent accountability measures for directors in the form of a standard of conduct, which for the first time, includes partially codified fiduciary duties and the duty of care and skill.[13] Apart from the latter duties, the Companies Act of 2008 also provides for the removal of directors, liability for breaches by directors as well as declaring a director delinquent.[14] The Higher Education Act of 1997 does not prescribe similar provisions, although the common law fiduciary duties apply to Council members. The provisions contained in the Companies Act of 2008 enhance accountability at board level. There is significant case law where directors were held personally liable for their breaches of fiduciary duties and where it was confirmed that fraudulent and reckless trading by executives would not be tolerated.[15] However, there is no known case law where a Council member of a higher education institution was found to have contravened his/her breach of fiduciary duty and was accordingly held personally liable.

Further to the Companies Act of 2008, the fourth iteration of the *King Code of Corporate Governance (King IV)*[16] is considered as well as the Banks Act 94 of 1990.[17] This study reviews relevant legislative changes to the Higher Education Act of 1997 and investigates how this Act can be amended further to improve governance practices at public higher education

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[12] Hereinafter referred to as the Companies Act of 2008.

[13] The fiduciary duties and the duty of care and skill are discussed in more detail in Chapter 4, para 4.2.5 and 4.2.6 below.

[14] These provisions are discussed in Chapter 4, para 4.2.8, 4.2.9 and 4.2.10 below.

[15] See for instance *Fourie v First Rand Bank Ltd* (2013) (1) SA 204 (SC); *Volvo v Yssel* (247/08)[2009] ZASCA. See in general, Chapter 4, para 4.2 below.

[16] See Chapter 4, para 4.4.3 below for a discussion on *King IV*.

[17] Hereinafter referred to as the Banks Act of 1990; see Chapter 4, para 4.3 for a discussion on the Banks Act of 1990.

institutions. The study considers explicitly whether specific duties and liabilities of Council members and executive management should be included in the Higher Education Act of 1997 to ensure effective accountability. Furthermore, the study investigates whether specific provisions relating to corporate governance and enhanced accountability contained in the Companies Act of 2008 as well as the Banks Act of 1990 can inform the Higher Education Act of 1997.[18]

1.1.4 Amendments to the Higher Education Act of 1997

Amendments to the Higher Education Act of 1997 brought about by the Higher Education and Training Laws Amendment Act 23 of 2012 raised several concerns.[19] Various higher education stakeholders[20] believed that these amendments would have a negative impact on the continued institutional autonomy[21] as well as academic freedom[22] of higher education institutions. The Higher Education and Training Laws Amendment Act of 2012 introduced new sections[23] and amended existing sections[24] that

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[18] These recommendations are made in Chapter 6, para 6.3 and 6.4 below.

[19] Hereinafter referred to as the Higher Education Amendment and Training Laws Amendment Act of 2012.

[20] These stakeholders include the Vice-Chancellors of public higher education institution; Universities South Africa and the Council for Higher Education (CHE); various submissions to this fact were made to Parliament. See https://pmg.org.za/committee-meeting/14944/ (Date of use: 3 December 2019). Also, see Rensburg I "Regulatory Overkill Threatens Academic Autonomy in South Africa" *Business Day* (date published: 31 January 2013); Gray BL "Despite These Many Challenges: The Textual Construction of Autonomy of a Corporatised South African University" 2017(21) *Education as Change* 1 – 21.

[21] Refers to a degree of self-regulation and independence of a higher education institution in fulfilling its day-to-day educational and academic obligations (Green Paper of 1996, Chapter 1 - para 4.6). See the discussion in Chapter 3, para 3.2 below regarding institutional autonomy, public accountability and cooperative governance.

[22]. This implies the absence of outside interference and obstacles in the practice of academic work (Green Paper, of 1996, chapter 1 - paragraph 4.6).

[23] Sections 45A and B and 49A - E of the Higher Education Act of 1997. These sections were further amended by the Higher Education Amendment Act 9 of 2016. The latter Act will be described in more detail in Chapter 3, para 3.4.2 below.

changed the independent assessor process[25] into a legal process, instead of allowing the assessor to do a general investigation of the circumstances of the institution in question.[26] Prior to these amendments, the independent assessor's mandate was relatively straightforward: he or she had to investigate the public university concerned, report the findings in writing to the Minister and suggest appropriate measures.[27] The Higher Education and Training Laws Amendment Act of 2012 extended the Minister's powers and simplified the process through which the Government can place a university under administration, thereby threatening institutional autonomy.[28] In terms of the new sections,[29] the Minister may issue directives and dissolve a university's Council.[30]

In the author's view, one of the reasons for enacting the Higher Education and Training Laws Amendment Act of 2012 was due to all the governance-related problems facing public higher education institutions. These problems were highlighted in the various independent assessors' reports for the institutions that were placed under administration in a relatively

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[24]Sections 27 and 47 of the Higher Education Act of 1997. Subsequently, this was amended by the Higher Education Amendment Act 9 of 2016. The latter Act is described in more detail in Chapter 3, para 3.4.2 below.

[25]Independent assessors are appointed by the Minister to investigate and report on allegations of misconduct at a university in terms of s 45A of the Higher Education Act of 1997.

[26] The Council of Higher Education "Submission on the Higher Education and Training Laws Amendment Bill to the Portfolio Committee on Higher Education and Training" October 2012 at 3. These amendments are discussed in more detail in Chapter 3, para 3.4 below.

[27] Section 47 of the Higher Education Act of 1997

[28] Sections 49A-E of the Higher Education Amendment and Training Laws Amendment Act of 2012.

[29] Sections 49A-E of the Higher Education Amendment and Training Laws Amendment Act of 2012.

[30] The Ministerial interventions are discussed in more detail in Chapter 3, para 3.4 below.

short period.[31] The DHET attempted to address these inadequacies by proposing legislative changes to the Higher Education Act 101 of 1997. As mentioned above, the Higher Education and Training Laws Amendment Act of 2012 has caused a considerable reaction within the higher education environment.[32] According to the Council of Higher Education (CHE),[33] Universities South Africa (USAf), as well as other individual higher education institutions,[34] they were not adequately consulted and provided with the opportunity to make recommendations before the promulgation of the Higher Education and Training Laws Amendment Act of 2012. Since the enactment of the said Act, the DHET met with various stakeholders to discuss their fears and to discuss possible amendments to address these concerns.[35] These consultations resulted in the promulgation of the Higher Education Amendment Act 9 of 2016.[36] The Higher Education Amendment Act of 2016 clarified certain of the issues raised by the Higher Education and Training Laws Amendment Act of 2012. However, not all issues were clarified, and the Minister is still able to place a university under administration.

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[31] See Chapter 3, para 3.3.2 below for a discussion on the universities that were placed under administration.

[32] The University of Pretoria, Central University of Technology (Free State), Council for Higher Education (CHE); Higher Education South Africa (HESA) made submissions before the enactment of the Bill, and other universities like the University of Johannesburg reacted only afterwards as they were not aware that the Bill had been published for commentary.

[33] Confirmed in their submission to the Portfolio Committee on Higher Education and Training in October 2012.

[34] For instance, the Central University of Technology and Durban University of Technology; see Nkosi B "Universities round on Nzimande and his Higher Education Amendment Bill" 2012-11-19 *Mail & Guardian*. Adv. Jeremy Gauntlett also confirmed it in an opinion he prepared for UCT on 13 February 2013.

[35] See Higher Education Amendment Bill (B36-2015) briefing by the Department of Higher Education and Training https://pmg.org.za/committee-meeting/21947/ (Date of use: 22 November 2018).

[36] The Higher Education Amendment Act of 2016 came into effect on 22 September 2017.

However, it is the author's opinion that further changes to the Higher Education Act of 1997 are necessary to ensure optimal governance and compliance by public higher education institutions. This study aims to provide relevant recommendations to ensure the improvement of governance and compliance practices in South African public higher education institutions. Amendments to the Higher Education Act of 1997 as well as the *2014 Reporting Regulations* are therefore recommended to assist universities in addressing accountability and governance shortcomings in public higher education institutions.

1.1.5 International comparison

The research also includes an international comparison with higher education regulation in the jurisdictions of the State of Georgia, United States of America (USA) and the province of Ontario, Canada. There are several reasons for the inclusion of these jurisdictions: the autonomous relationship between the government and these institutions; the legislation applicable to these institutions; and the type of policies, procedures and programmes they have in place to enhance corporate governance and accountability. Various legislative instruments in both jurisdictions are considered with the view of recommending the inclusion of similar provisions in the South African Higher Education Act of 1997. The public higher education institutions in these jurisdictions are incorporated as corporations, and there are some similarities between the corporate laws of these jurisdictions and provisions contained in the South African Companies Act of 2008. This also points out the extent to which they may assist corporate governance practices in South African public higher education institutions, albeit that they are not incorporated as companies.[37]

[37] These international jurisdictions and their legislation are discussed in more detail in Chapter 5 below.

1.1.6 Rationale and problem statement

The general introduction in par 1.1.1 above provides the background and rationale for the study and puts the problem statement and guiding research question into proper context. The problem statement underpinning this research is that corporate governance practices and their consequence management in South African higher education could be improved.[38] It seems that management decisions are not always in the best interests of the university nor aligned with acceptable corporate governance practices. Inadequate corporate governance practices at various higher education institutions have led to several institutions being placed under administration in recent years.[39] The independent assessors' reports of these institutions indicate that there is an urgent need to improve governance practices in public higher education institutions.[40] Although the DHET has implemented various changes to the Higher Education Act of 1997 to improve governance practices at public higher education institutions,[41] these legislative changes have been perceived as a threat to institutional autonomy by various higher education stakeholders.[42] This research considers the concept of institutional autonomy and assesses,

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[38] Several universities were placed under administration before and after the advent of democracy, one of them more than once. Currently, one public university is involved in litigation against a senior member of management as well as its former chairperson. This is discussed in detail in Chapter 3, para 3.3.2 below.

[39] These include the University of Zululand; Walter Sisulu University; Vaal University of Technology; and the Tshwane University of Technology. The independent assessors' reports for these institutions all indicate instances of governance failings and mismanagement. See in general, Stumpf, R "Analysis of recent assessor reports of universities in SA" HESA July 2012 (unpublished report).

[40] The various universities placed under administration are discussed in Chapter 3, para 3.3.2 below.

[41] These amendments are discussed in chapter 3, para 3.4 below. The Higher Education Act of 1997 is discussed more fully in Chapter 2, para 2.2.3 below.

[42] The Vice-Chancellors of the various public higher education institutions; CHE and USAf, see Rensburg I "Regulatory Overkill Threatens Academic Autonomy in South Africa" 2013-01-31 *Business Day* Du Toit A "Revisiting 'Co-operative Governance' in Higher Education" 2014 *Higher Education South Africa* 1 – 2; Gauntlett J Opinion to UCT on the Higher Education Training and Amendment Act 23 of 2012 (18 February 2013).

whether recent legislative interventions indeed threaten it. The Higher Education Act of 1997 promises autonomy to institutions in its preamble by stating that "... for higher education institutions to enjoy freedom and autonomy in their relationship with the State within the context of public accountability and the national need for advanced skills and scientific knowledge."[43] It was during 2012 with the promulgation of the Higher Education and Training Laws Amendment Act 23 of 2012 that the various higher education stakeholders indicated that these amendments might constitute a threat to institutional autonomy.[44] These amendments provide the Minister with more powers to dissolve a public higher education institution's Council and place it under administration. This research investigates whether these amendments genuinely threaten institutional autonomy or whether there is a justifiable reason for the amendment.

This thesis interrogates the corporate governance practices in South African higher education institutions relating to governance accountability and determines whether they can be regarded as adequate. These issues are investigated concerning relevant company and banking law guidelines as well as governance practices in selected international higher education jurisdictions.[45]

1.1.7 Points of departure, assumptions and hypothesis

As a point of departure, the pre-1994 South African higher education landscape is briefly reviewed to indicate the fragmentation of higher education during that period.[46] This is followed by a description of the

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[43] Institutional autonomy is discussed in Chapter 3, para 3.2.1 below.

[44] See these submissions at https://pmg.org.za/committee-meeting/14944/ (Date of use: 3 December 2018); Rensburg I "Regulatory overkill threatens academic autonomy in South Africa"2013-01-31 *Business Day*.); Jenvey N "New Legislation is a blow to university autonomy" 2012-12-9 *University World News*.

[45] Chapter 5 below contains the international comparison.

[46] This is discussed more fully in Chapter 2, para 2.1 below.

situation post-1994, and the improvements in higher education regulation, including the promulgation of the Higher Education Act of 1997 after the advent of democracy.[47]

There are several assumptions discussed in this research. The first relates to the assumption that public higher education institutions have institutional autonomy as provided for in the preamble of the Higher Education Act of 1997, although the DHET has never promised complete autonomy. Institutional autonomy must be balanced against public accountability.[48] It is also assumed that public higher education institutions are subject to public accountability since the government funds them, and they need to report on how state funds were spent.[49] Another assumption is that both the Council and the executive management of a public higher education institution are subject to common law fiduciary duties, as well as the duties of care and skill. As such, they could be held accountable for breaches of these obligations.[50] However, thus far, such accountability has not arisen in practice. Since these duties and principles of corporate governance are well developed in company law, a comparison between the governance practices of a company and those of higher education institutions would be useful.[51]

The hypothesis posed in this research is that public higher education institutions will benefit from several amendments to the Higher Education Act of 1997. These amendments would include a standard of conduct, holding Council members personally liable for the breach of their fiduciary

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[47] Higher education in the post-1994 era is discussed in Chapter 2, para 2.2 below.

[48] See the preamble to the Higher Education Act of 1997, which promises institutional autonomy, but also states that it must be balanced against public accountability. Institutional autonomy is discussed more fully in Chapter 2, para 3.2.1 below.

[49] See Chapter 3, para 3.2.1 for a discussion on public accountability.

[50] The Council of a university is discussed in Chapter 2, para 2.3.2(b.1) below.

[51] Corporate governance in the South African context is discussed in Chapter 4, para 4.4 below.

duties, removal of errant Council members, declaring a Council member delinquent and corporate governance provisions.[52] These suggested amendments would assist in holding Council members as well as executive management accountable for not acting in the best interests of the institution and breaching their fiduciary duties.[53] It is suggested that if these changes were to be included in the Higher Education Act of 1997, governance and compliance in public institutions would improve. Once governance has improved, the DHET would need to rely less on the ministerial interventions contained in the Higher Education Amendment Act of 2016, and therefore institutional autonomy will not be threatened.[54]

1.2 RESEARCH METHODOLOGY AND RESEARCH QUESTIONS

1.2.1 Research methodology

This section provides an overview of the research methodology used in this thesis.[55] The study employs mixed disciplines, a common approach in legal research.[56] These disciplines include a hermeneutic discipline,[57] an argumentative discipline,[58] an empirical discipline,[59] an explanatory

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[52] See Chapter 6, para 6.3 below for the recommended amendments.

[53] All recommendations, including the formulation of such a standard, are outlined in Chapter 6 below.

[54] The ministerial interventions are discussed in Chapter 3, para 3.3 below.

[55] According to Hesse-Biber, research methodology entails "the methods, techniques and procedures that are used in the process of implementing the research design or research plan, as well as the underlying principles and assumptions that underlie their use". For methodology in general, see Hesse-Biber SN *The Practice of Qualitative Research* 3rd ed (SAGE 2017) 7 – 10; Babbie ER and Mouton J *The Practice of Social Research* (South African Edition Cape Town: Oxford University Press 2005) 269 – 311.

[56] For more on multi-method research, see Cane P and Kritzer HM (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford United Kingdom 2010) 953 – 956.

[57] According to Van Hoecke, a hermeneutic discipline interprets texts and arguments about a choice among different interpretations. Van Hoecke M (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing United Kingdom 2011) 4.

[58] Within this discipline, it is the argumentation to support some legal interpretation or solution that is emphasised, rather than the interpretation as such. Van Hoecke (ed)

discipline[60] and relevant discipline.[61] Further to the latter disciplines, this study also uses a qualitative approach.[62] According to Creswell, qualitative research "...is a means for exploring and understanding the meaning of individuals or groups ascribed to a social or human problem."[63] Qualitative research follows a research strategy that is relatively open and unstructured, and the data are usually collected through three main methods, used either on their own or in combination, of direct observation, in-depth interviews and the analysis of documents.[64] Even when interview schedules are used as a research technique, the researcher provides minimal guidance to interviewees, allowing them considerable latitude when responding to questions. In this study, interviews were conducted either through electronic communication via email or in person. The interviews were either structured, with specific questions forwarded to the

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Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline? 4 – 5.

[59] According to Ross, "empirical verification takes place by checking statements in legal doctrine against the judicial practice", see in general Ross A *On Law and Justice* (Stevens & Sons London 1958) 40. The empirical discipline is used quite often in the legal field; accordingly, whether a particular law exists may be checked empirically but what the legal doctrine is mainly about, is the actual interpretation of that law and balancing it with other laws and principles. See also Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* 5 – 7.

[60] According to this discipline, it is explained why a rule is a valid legal rule in society. According to Van Hoecke, "in this approach, the existence of a rule will be "explained" by the existence of a higher norm, from which that rule is derived, or the existence of underlying values or principles, or a more extensive network of legal rules and principles," See Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* 8.

[61] It is necessary to emphasise the importance of logic in legal reasoning and the scientific structuring of legal data. However, legal data are too indefinite to be perceived as a purely logical discipline. Too much depends on the interpretation of legal principles, rules and concepts. See Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* 9.

[62] For more on qualitative research in general, see in general Cane and Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* 927 – 948.

[63] Creswell JW *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* 3rd ed (SAGE United States 2009) 4; see in general Creswell JW *Qualitative Inquiry & Research Design: Choosing Among Five Approaches* 3rd ed (SAGE 2013) 42 – 128; Hesse-Biber *The Practice of Qualitative Research* 2 – 63; Silverman D *Interpreting Qualitative Data* 5th ed (SAGE United Kingdom 2014) 3 – 160.

[64] Cane and Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* 928.

individuals, or unstructured, mainly with questions asked and answered by the interviewees in person. The structured interviews took place with specifically targeted individuals within the Department of Higher Education and Training. There were also structured interviews via email with individuals like Prof Chris de Beer, former administrator for the University of Zululand, Prof Johann de Jager from the South African Reserve Bank and Prof Theresa Shanahan, Ms Maureen Armstrong and Mr Bob Everett from York University in Ontario, Canada. Unstructured interviews took place either in person or via email with individuals from the University System of Georgia (USG) which included Mr John Fuchko, Mr Michael Foxman, Mr Wesley Horne, Ms Kenyatta Morrison and Ms Shelley Nickel; Mr Barry McCarton from the Ministry of Training, Colleges and Universities; Prof Glen Jones and Prof Ian Lee from the University of Toronto and Mr Brent Davis Davis from McMaster University. These interviewees were each chosen for their specific knowledge and expertise in either corporate governance, company law or higher education. Since the positions of interviewees, standard questionnaires were not used. These questions were used to gather information.[65]

According to Schumacher and McMillan,

> ……research design is the plan and structure of the investigation; it is used to obtain evidence in order to answer specific research questions. The design describes the procedures for conducting the study.[66]

Mouton suggests that the research design enables researchers to anticipate the appropriate research decisions in order to maximise the

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[65] Typical questions asked during interviews and email exchanges included the following: What legislation governs public higher education in your jurisdictions? What external and internal governance structures are in place at public higher education institutions? What governance documents and policies are in place at these public institutions? What is the level of state involvement in public higher education institutions, and how do they investigate any mismanagement?

[66] Schumacher SJ and McMillan JH *Research in Education - a Conceptual Introduction* (London College 1993) 31.

validity of the eventual results.[67] In this thesis, the research involves a literature study of various books, accredited and unaccredited academic articles, electronic and internet resources, media reports and newspaper articles, published and unpublished reports and policy documents, dissertations and theses, White Papers, relevant case law, *Government Gazettes* and applicable legislation. Further to this, ethical clearance was obtained to conduct interviews with key role-players in management at higher education institutions as well as the ministries responsible for higher education in both Georgia, USA and Ontario, Canada. Interviews were also conducted by way of emails, as mentioned above, where questionnaires were forwarded to high-ranking professors at higher education institutions in Ontario, Canada. Valuable information was obtained through these interviews.

Within the scope of empirical research, empirical observations or data are collected in order to answer the research questions.[68] This methodology was combined with a comparative analysis of selected international jurisdictions.[69] This is a commonly used methodology in legal research. Comparative legal studies can be done with different objectives in mind. One of the principal aims of a comparative legal study is to gain a better understanding of a legal system and establish whether it offers possible solutions to situations, which are unclear in a given system.[70] There are three phases in a comparative legal study: investigating the relative legal systems to obtain information on the content of each of the applicable legal rules; analysing the relevant elements of each of these legal systems, taking into account the background and social framework of each of these

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[67] Mouton J *Understanding Social Research* (Van Schaik Publishers Pretoria 1996) 107.

[68] Mouton J *How to succeed in your Master's and Doctoral Studies* 1st ed (Van Schaik Publishers Pretoria 2001).

[69] The choice of jurisdiction is motived below in the summary of Chapter 5.

[70] Van Zyl DH *Beginsels van Regsvergelyking* (Butterworth's 1991) 17 – 21; Eberle EJ "The Method and Role of Comparative Law" 2009 (8) *Washington University Global Studies Law Review* 452 – 455.

systems; and considering the similarities and differences between the elements in both the South African and the international legal systems to arrive at a synthesis.[71] It was with this object in mind that the comparative analysis was undertaken in this study. There is a difference between "descriptive" and "applied" comparative legal research. The first is merely a description of the content of the relevant legal systems without drawing any conclusions; the latter points out the differences and similarities among the various legal systems to conclude.[72] The last technique was used in this research where comparisons were drawn between the higher education system, corporate law and corporate governance system of South Africa and those of Georgia, USA and Ontario, Canada. The differences and similarities are discussed in Chapter 5, while Chapter 6 contains the recommendations based on the positive conclusions drawn from this comparison. It was essential to select the most appropriate methods, techniques and methodological paradigm to achieve the objectives of the study, in particular, because it interrogates aspects of company law and corporate governance in another context, that of higher education.

1.2.2 Research questions

Researchers ask specific questions to help them answer and provide solutions to the research problem under investigation. The following research questions are addressed in this thesis:

- Has governance improved in the South African higher education sector since the attainment of democracy?
- Do the recent legislative changes in higher education threaten institutional autonomy?
- Is there enough public accountability in respect of public higher education institutions?

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[71] Venter F *et al. Regsnavorsing: Metode en Publikasie* (Juta en Kie Cape Town 1990) 219; Eberle 2009 *Washington University Global Studies Law Review* 455 – 470; Kroeze IJ "Legal Research Methodology and the dream of Interdisciplinarity" 2013 (16) *PER* 49.

[72] Van Zyl *Beginsels van Regsvergelyking* 35.

- Why have there been so many failures in the governance of public higher education institutions?
- Will the higher education environment benefit from further legislative changes through the inclusion of a standard of conduct for Council members?
- Will the higher education environment benefit from amending its *2014 Reporting Regulations* to include a code of good governance?

1.2.3 Research objectives and aim of the study

This study aims to recommend possible improvements to corporate governance practices at South African higher education institutions in order to increase the accountability of Council members and executive management in appropriate instances.

In order to provide answers to the research questions and to achieve the aim of the study, the research objectives are formulated as follows:

- Consider the post-democracy higher education landscape in South Africa;
- Investigate whether the inclusion of some or similar, provisions to those contained in the Companies Act of 2008 and the Banks Act of 1990 will improve the Higher Education Act of 1997. These provisions include those confirming fiduciary duties, the removal of certain officers and ones relating to delinquency;
- Review the accountability of Council members and executive management of higher education institutions. Although there are common law provisions for this, the inclusion of statutory provisions in the Higher Education Act of 1997 could assist public universities in holding Council members and members of the executive management accountable for not acting in the best interests of the institution; and
- Compare the regulation of relevant aspects of South African higher education, corporate law and corporate governance with the positions in selected jurisdictions in the USA and Canada to ascertain whether

any guidance may be obtained from the latter jurisdictions to improve corporate governance in higher education institutions in South Africa.

1.2.4 Terminological clarification

In the interests of clarity, terms frequently used in this thesis are briefly defined at the beginning of Chapter 1. Comprehensive conceptual clarifications of research-specific terms are provided in the appropriate chapters. Authorities are cited in full when first referred to; after that, they are referred to in abbreviated form in the footnotes. The full titles and references are provided in the bibliography at the end of the thesis.[73] All newspaper articles are cited with the date included on which the article was published, while all internet resources are cited with the date on which the article was accessed.

Court cases are cited in full when referred to for the first time. In the footnotes, the abbreviation "para" is used to refer to a paragraph, while "s" is used to indicate a particular section of the legislation.

The law is stated as it is up to and including 31 December 2018

[73] The methods of citation comply with Unisa's modes of citation provided to doctoral candidates.

CHAPTER 2: THE SOUTH AFRICAN HIGHER EDUCATION LANDSCAPE

2.1 INTRODUCTION AND BACKGROUND

This chapter commences with a brief historical overview of higher education in South Africa before Apartheid was entrenched in South Africa. It then examines how Apartheid influenced higher education. The focus thereafter moves to the progression of higher education regulation since the attainment of democracy in 1994. It is essential to discuss the influence of Apartheid on higher education, as it is indicative that the structure of the higher education system was in need of an overhaul. This may be a potential reason why corporate governance practices have not yet been reviewed extensively.

The chapter also discusses the legislative and governance framework of higher education institutions, including policy development and ultimately, the promulgation of the Higher Education Act of 1997.

Higher education in South Africa started with the establishment of the South African College in Cape Town in 1829. From 1829 until 1874, a series of similar colleges were established under the auspices of the Dutch Reformed Church and the Church of England in the Western Cape, Eastern Cape, Bloemfontein and Pietermaritzburg. Eventually, these colleges migrated to universities. For instance, the University of Cape Town evolved from the South African College.[1]

2.1.1 History of Apartheid

Apartheid has a long history. The English translation of the word means “separateness.” Apartheid developed in the 1930s and 1940s,

[1] Coetzee CJS and Geggus C *University Education in the Republic of South Africa* (South African Human Research Council Pretoria 1980) 3.

following from the policy of segregation which it replaced.[2] The term "Apartheid" was used commonly in discussions about race and politics by Afrikaner Nationalists who wanted white domination in South Africa.[3] The Population Registration Act 30 of 1950[4] laid down the procedures for classifying and reclassifying the South African population into three racial groups namely "White,"[5] "Native"[6] and "Coloured"[7] by using three classificatory criteria: appearance, acceptance and descent.[8] Apartheid made segregation part of the law and cruelly and forcibly separated people and races. The apartheid regime wielded a fearsome state apparatus which punished those who opposed it.[9] Apartheid was regarded by many as being worse than segregation insofar as it was introduced at a period when other countries were moving away from racist policies, whereas South Africa opted instead to promote racial separation. It was after the African National

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[2] This paragraph provides a short background to Apartheid and its influence on higher education. However, the focus of the thesis is on the post-Apartheid era. For more on Apartheid in general, see Fiske EB and Ladd HF *Elusive Equity: Education Reform in Post-Apartheid South Africa* (Brookings Institutional Press Washington 2004) 20 – 39.

[3] Verwey C and Quayle M "Whiteness, Racism and Afrikaner identity in Post-Apartheid South Africa" 2012(111) *African Affairs* 551 – 575.

[4] Hereafter referred to as the Population Registration Act of 1930.

[5] In terms of the Population Registration Act of 1930, a White person was defined as "a person who in appearance obviously is, or who is generally accepted as a White person, but does not include a person who, although in appearance obviously a White person, is generally accepted as a Coloured person".

[6] Renamed "Bantu" then "Black". Black people in this context refers specifically to African American people. "Native" is defined in the Population Registration Act of 1930 as "a person who in fact is or is generally accepted as a member of any aboriginal race or tribe of Africa".

[7] In terms of the Population Registration Act of 1930, a Coloured person is "a person who is not a White person or a Native".

[8] Erasmus Y *Racial (re)classification during apartheid South Africa: Regulations, Experiences and the Meaning(s) of "Race"* (Published PhD thesis University of London).

[9] This regime forcibly separated people according to their race and perceived the white race as dominant.

Party came into power in 1948 that South Africa introduced the more rigid racial policy of Apartheid.[10]

The first Constitution of South Africa was the South Africa Act of 1909 created by an Act of British Parliament. This Act provided a framework for government but was not a complete constitutional code.[11] The Republic of South Africa was established by the promulgation of the Republic of South Africa Constitution Act 32 of 1961. One of the significant changes that the Constitution Act of 1961 brought about is that South Africa changed from a Union within the British Commonwealth to a Republic outside of the Commonwealth.[12] This Constitution was later replaced by the Republic of South Africa Constitution Act 110 of 1983.[13] Black people had no representation in Parliament.[14] The government at the time did everything in its power to separate the races and to promote the white race as being superior. Various Acts were implemented to achieve racial segregation to ensure that only White people benefited from Apartheid.[15] Today South Africa still faces many challenges due to its deep-rooted history of political exclusion, racial and class discrimination and inequality.

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[10]See in general, South African History "Apartheid and Reactions to It". http://www.sahistory.org.za/article/apartheid-and-reactions-it (Date of use: 17 May 2018).

[11] Marais R *Constitutional Development of South Africa* (Southern Book Publishers Pretoria 1981) 31 -55

[12] Marais D *South Africa: Constitutional Development: A Multi-Disciplinary Approach* (Southern Book Publishers Pretoria 1989) 161.

[13] Hereinafter referred to as the Constitution of 1983. This referendum was held on 12 September 1983: Marais *South Africa: Constitutional Development: A Multi-Disciplinary Approach* 253.

[14] Marais *South Africa: Constitutional Development: A Multi-Disciplinary Approach* 253.

[15] Some of these acts were the Population Registration Act 30 of 1950; the Promotion of Bantu Self-Government Act 46 of 1959; the Bantu Education Act 47 of 1953; the Suppression of Communism Act 44 of 1950; Prohibition of Mixed Marriages Act 55 of 1949; the Immorality Amendment Act 21 of 1950; the Separate Representation of Voters Act 46 of 1951 and the Reservation of Separate Amenities Act 49 of 1953.

The Apartheid-era also had a detrimental effect on education and the post-1994 government inherited a deeply troubled higher education system. During Apartheid, various policies had been put in place to ensure that higher education institutions benefited Whites. These institutions were divided into either universities or technikons and were controlled by various government departments, causing them to be ineffective and difficult to manage. The National Party viewed the essence of a university as science, while the essence of a technikon was technology.[16] Different Ministries were responsible for the education of different races. Under the Constitution of 1983, the Minister of Education and Culture: Administration, House of Representatives was responsible for the education of Coloured and Indian people whereas the Department of National Education was responsible for the higher education of White people. According to the Constitution of 1983, the provincial education departments became sub-departments of the Department of Education and Culture, Administration: House of Assembly. Thus, higher education became the responsibility of this ministry. Furthermore, the Constitution of 1983 divided the national parliament into three chambers with a separate representation of White voters (House of Assembly), Coloured voters (House of Representatives) and Indian voters (House of Delegates).[17] There was no representation for Africans.[18] A clear distinction was drawn between "own affairs"[19] and "general affairs".[20] "Own affairs" pertained to matters specific to the "cultural and value frameworks" of the Coloured, Indian or White communities. "General affairs", on the

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[16] Cloete N *et al. Transformation in Higher Education: Global Pressures and Local Realities in South Africa* (Juta Pretoria 2002) 62 - 63

[17] Section 7 of the Constitution of 1983; Vos AJ and Brits VM *Comparative Education and National Education Systems* (Butterworths Durban 1990) 70 – 7.

[18] Council on Higher Education (CHE) *South African Higher Education in the First Decade of Democracy* (2004) 22 – 23.

[19] Section 14 of the Republic of South Africa Constitution Act 110 of 1983.

[20] Section 15 of the Republic of South Africa Constitution Act 110 of 1983; CHE *Higher Education Reviewed: Two Decades of Democracy* 2016 65; Cloete *et al. Transformation in Higher Education: Global Pressures and Local Realities in South Africa* 36.

other hand, referred to matters which had an impact on all racial communities. By 1984, education was classified under "own affairs" as far as Whites, Coloureds and Indians were concerned. Education for White people resorted under the House of Assembly, education for people of colour under the House of Representatives and education for Indians was the responsibility of the House of Delegates. According to the Constitution of 1983, the education of African people was classified as "general affairs." The responsibility for the education of Africans was vested in the Department of Education and Training.[21] According to the National Commission on Higher Education's *Framework for Transformation,*[22] one of the main characteristics of the higher education system throughout the pre-1994 era was that it provided for a racially segregated higher education system consisting of historically White universities (HWUs) and historically Black universities (HBU's).[23] One of the Acts that played a key role during the pre-1994 era was the Bantu Education Act 47 of 1953[24], which officially divided educational institutions along racial lines. The Act stipulated that "Bantu"[25] people would be excluded from quality academic education and training.[26] According to section 2(a) of the Bantu Education Act of 1953,[27] "the control of native education shall vest in the Government of the Union, subject to the provisions of the Act". In terms of section 3, the Department

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[21] Cloete *et al. Transformation in Higher Education: Global Pressures and Local Realities in South Africa* 60.

[22] National Commission on Higher Education (hereafter NCHE) *Framework for Transformation* (1996). The NCHE and this report are discussed more fully in para 2.2 below. Hereafter referred to the *NCHE Report.*

[23] Bitzer E *Higher Education in South Africa* (Sun Media Stellenbosch 2009) 11.

[24] Hereafter referred to as the Bantu Education Act of 1947.

[25] According to the definitions of the Bantu Education Act of 1953, "Bantu" means "native" which refers to any person who is or is generally accepted as a member of any aboriginal race or tribe of Africa.

[26] *NCHE Report* 29.

[27] For more on the Bantu Education Act of 1953, see in general Mabokela RO *Voices of Conflict: Desegregating South African Universities* (Routledge Falmer New York 2000) 18 – 20.

of Native Affairs was responsible for the direction and control of native education. The Extension of the University Education Act 45 of 1959[28] continued this system of racial divide by establishing racially based universities. According to section 2 of the Extension of University Education Act of 1959, the Minister of Bantu Education was able to establish university colleges for Bantu persons. Section 3 allowed the establishment of university colleges for non-White people other than Bantu persons. According to section 17, no White people were allowed to attend those university colleges. Prior to the promulgation of the latter Act, universities chiefly catered for White students, although there was no official legislation preventing Blacks from applying at these universities. The Extension of the University Education Act of 1959 formally restricted access to universities according to race: Blacks were only allowed in instances where equivalent programmes were not offered at a Black university, and this was only done after ministerial permission was obtained. It was, in fact, a criminal offence for a non-White student to register at a historically White university without the written consent of the Minister of Internal Affairs.[29] The HWUs, although providing tuition in both Afrikaans and English, were dominated by Afrikaans executives and governing bodies that strongly supported the Apartheid government.[30] Black universities were forced to adapt according to the educational model used by White universities.[31] By 1988, eleven higher education institutions had been created under the Extension of the University Education Act of 1953.[32]

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[28] Hereafter referred to as the Extension of the University Education Act of 1959. For more on this Act, see in general, Mabokela *Voices of Conflict: Desegregating South African Universities* 24 – 27.

[29] Sections 31 and 32 of the Extension of University Education Act of 1959; *NCHE Report* 29.

[30] Cloete *et al. Transformation in Higher Education: Global Pressures and Local Realities in South Africa* 45.

[31] Bitzer *Higher Education in South Africa* 12.

[32] CHE "*South African Higher Education in the First Decade of Democracy"* (2004) 22; Vos and Brits *Comparative Education and National Education Systems* 88 – 89.

University education for Black people was formalised on 8 February 1916 with the establishment of the South African Native College. In 1923 this college became a constituent college of the University of South Africa (UNISA) and was subsequently renamed the University of Fort Hare. Until 1960, this was the only university specifically established for Black students.[33] During 1961, the Colleges of the North and Zululand were established after the Extension of University Education Act of 1953 was promulgated. For the next ten years, these three colleges resorted under the wing of UNISA, which oversaw the curricula, examinations, degrees and academic affairs in general until 1970, when the colleges were granted full autonomy and university status.[34] The University of Western Cape (UWC) started as a residential university for Coloured students and obtained autonomy in 1970. In 1961, the University College for Indians was established in Durban, also under the wing of UNISA, until it became an autonomous university in 1971 in the form of the University of Durban-Westville. It is clear that UNISA played an important role in the establishment of universities for the population marginalised under Apartheid.[35]

The Universities Amendment Act of 1983 repealed the legislation that prohibited Black students from being admitted to White universities. This Act was passed in response to increasing international pressure and political unrest in South Africa. Black people could, therefore, be admitted to White universities after the passing of this Act.[36]

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[33] Coetzee and Geggus *University Education in the Republic of South Africa* 4.

[34] Coetzee and Geggus *University Education in the Republic of South Africa* 4.

[35] Coetzee and Geggus *University Education in the Republic of South Africa* 5.

[36] Mabokela *Voices of Conflict: Desegregating South African Universities* 29.

Universities, colleges and technikons[37] were clearly differentiated.[38] The boundaries amongst these institutions were shaped by the Van Wyk de Vries Commission[39] and the Goode Committee[40], which distinguished between the functions of these institutions.[41] The Van Wyk de Vries Commission clearly specified the university as the leader at a tertiary level as well as confirming its institutional autonomy.[42] The Commission furthermore confirmed that universities should be free from interference by the state, community, church, academics, students and others.[43]

The *National Commission on Higher Education (NCHE) Report* distinguished between the functions of universities, colleges and technikons as follows:

> A main function of universities is to educate students in a range of basic scientific (or scholarly) disciplines with a view to high level professional training; while that of technikons is to train students in the application of knowledge rather than in basic knowledge itself with the view to high level career training; and that of colleges is preparation for specific vocations such as nursing, teaching and policing. Universities engage in basic scientific research, technikons engage in developmental scientific research and colleges are not expected to do research.[44]

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[37] These three types of institution are defined in the Higher Education Act of 1997. However, colleges and technikons fall outside the scope of this research and are not discussed in detail. It should also be mentioned that due to various mergers, former technikons were incorporated into existing universities.

[38] *NCHE Report* 29 – 30.

[39] Departement van Nasionale Opvoeding "Hoofverslag van die Kommissie van ondersoek na die Universiteitswese" 1974. Hereafter referred to as the *Van Wyk de Vries Commission*.

[40] *Goode Committee* 1978

[41] *NCHE Report* 30. Chapter IV of the *Van Wyk de Vries Commission Report* discusses universities while colleges and other forms of tertiary institutions are discussed in Chapter VII.

[42] *Van Wyk De Vries Commission Report* 879.

[43] *Van Wyk De Vries Commission Report* 69.

[44] *NCHE Report* 30.

The Apartheid government considered that a public higher education institution was a legal entity created by the state and its actions should, therefore, be determined and controlled by the state.[45] The Van Wyk de Vries Commission recommended substantial institutional autonomy for the HWUs, which resulted in weak state supervision and minimal government interference. It is clear that by the attainment of democracy in 1994, higher education in South Africa was in dire need of radical change and transformation. However, it should be noted that each university was founded by an Act of Parliament, thereby implying that its functions were prescribed by Parliament and that Parliament could terminate it.[46] Thus it could be argued that, in principle, little autonomy existed within higher education during the pre-1994 era, yet at the same time, there was a policy dictating that a university was *"*.....an independent sphere of societal relationship.*"*[47] Governance of these higher education institutions was complex. For instance, before 1994, the co-ordination of the higher education system was the responsibility of the Department of National Education. Its primary function was to set and monitor financial and academic norms and standards. Universities, technikons and colleges for Whites, Coloureds and Indians were each governed by a separate Department of Education. Six other Departments of Education were responsible for some of the colleges in the self-governing territories. To add to the confusion, four additional Departments of Education were responsible for universities, technikons and colleges in the independent states of Transkei, Bophuthatswana, Venda and Ciskei.[48] It is thus clear that under Apartheid, the governance framework of universities was fragmented and uncoordinated to say the least, which in turn resulted in an

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[45] Cloete *et al. Transformation in Higher Education: Global Pressures and Local Realities in South Africa* 37.

[46] CHE "*South African Higher Education in the First Decade of Democracy"* 23.

[47] CHE "*South African Higher Education in the First Decade of Democracy"* 23. This implies that a university functioned separately from the state.

[48] *NCHE Report* 41 – 42. These four states are independent of South Africa.

inefficient governance system.[49] The post-1994 government faced an enormous challenge in transforming the system and addressing the inequalities of the past. The government needed to ensure that the higher education system was planned, directed and funded as a single coordinated system. It intended to reach these goals by introducing various policies, processes and documents[50] aimed at restructuring higher education.[51]

2.2 HIGHER EDUCATION IN THE POST-1994 ERA

The current system of governance within higher education in South Africa is embodied in the Higher Education Act of 1997. Several policy documents such as the *Education White Paper 3: A Programme for the Transformation of Higher Education*[52] and the National Plan for Higher Education (NPHE) informed and amplified the Higher Education Act of 1997.[53] These policies and legislation, together with each institution's statute, define co-operative governance and the roles and responsibilities of the Councils, Senates and Institutional Forums of higher education institutions.[54] Transformation of higher education in South Africa began with the election of a new democratic government in 1994. Since then, policy development and the promulgation of legislation relating to higher education have been addressed. Since 1994, policy development was primarily influenced by the

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[49] *NCHE Report* 41 - 42.

[50] These documents, like the *1997 White Paper*, are discussed in para's 2.2.2 – 2.2.3 below.

[51] Waghid Y "Democracy, higher education transformation and citizenship in South Africa" 2003(17) *SAJHE* 91.

[52] Hereafter referred to as the *1997 White Paper*.

[53] CHE *Higher Education Reviewed: Two Decades of Democracy* 2016 63 – 64. Recently, the National Development Plan 2030 as well as Africa 2063 has been implemented, which also includes education.

[54] Hall H, Symes A and Luescher TM "Governance in South African Higher Education" 2002 Research Report prepared for CHE 31.

Constitution.[55] The Constitution contains the Bill of Rights. The provisions of the Bill of Rights are among other things applicable to both students and staff of universities. The Bill of Rights also includes the right to "academic freedom and freedom of scientific research."[56]

2.2.1 National Commission on Higher Education (NCHE)

Policy development for the transformation of higher education in South Africa started with the appointment of the National Commission on Higher Education (NCHE).[57] This Commission was given the mandate to develop a policy framework for the transformation of higher education, which by then included universities, technikons and colleges. The NCHE formed committees, task teams and working groups to embark on this investigation which in 1996 resulted in a report entitled *A Framework for Transformation*.[58] In this report, the NCHE clearly enunciates the need for transformation and articulates the deficiencies, realities, opportunities and challenges in the higher education system. It furthermore establishes the principles upon which the new higher education system should be founded.[59] This process began by the NCHE in 1995, ultimately led to the

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[55] Hereinafter referred to as the Constitution; see Badat S "Theorising Institutional Change: Post-1994 South African Higher Education" 2009(34) *Studies in Higher Education* 459.

[56] CHE *Higher Education Reviewed: Two Decades of Democracy* 2016 70; s 16(1)(d) of the Constitution as well as schedule 4, part A of the Constitution.

[57] Hereafter referred to as the NCHE.

[58] This report was submitted to the Minister of Education in fulfilment of the Commission's terms of reference and was published in *Government Gazette* Nr. 16243 (GN. 5460) 3 February 1995. See in general, the DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 12 – 14; Fiske and Ladd *Elusive Equity: Education Reform in Post-Apartheid South Africa* 208 – 209; Mda T and Mothata S (eds) *Critical Issues in South African Education – After 1994* (Juta Kenwyn 2000) 4.

[59] Ferreira MF *A Framework for Continuous Improvement in the South African Higher Education Sector* (PhD thesis University of Pretoria 2003) 53.

introduction of the Higher Education Act in 1997.[60] In fulfilment of its terms of reference,[61] the Commission needed to advise the Minister on the following:[62] the goals and values of higher education in South Africa; the types of institutions and the nature of the system which would be best suited to realise these goals; the necessary restructuring of administration, governance and financing of the new system; and the specific measures needed to eliminate inequalities of the past and the appropriate mechanisms, structures and procedures to implement all of the recommendations.[63] Chapter 7 of this report relates to co-operative governance, where it, amongst other issues, discusses the three models of relationships among the government and the higher education institutions. These models are state control, state supervision and state interference.[64] The report then proposes a new model referred to as co-operative governance, which is broadly located within the framework of state supervision.[65] The report also advocates for an institutional governance framework consisting of beneficial relationships between the institution and other social constituencies, as well as adequate internal decision-making arrangements.[66] Proposals made regarding the restructuring of some of the governance structures like the Council, Senate and Institution Forum were implemented.[67] Lastly, it was proposed that a new Higher Education Act be enacted repealing the Universities Act 61 of 1995, the Technikons Act 125

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[60] Bitzer *Higher Education in South Africa* 13. The Higher Education Act of 1997 is discussed in more detail in para 2.2.3 below.

[61] *Government Gazette* Nr. 16243 (GN. 5460) 3 February 1995.

[62] The Minister of Higher Education and Training.

[63] *NCHE Report* 23.

[64] *NCHE Report* 174 – 175; these models are discussed in more detail in Chapter 3, para 3.2.2 below.

[65] *NCHE Report* 176. See also Cloete *et al.* Challenges of Co-operative Governance (CHET, 2003) 4 – 8.

[66] *NCHE Report* 199.

[67] *NCHE Report* 201 – 208.

of 1993 as well as the private Acts and institutional statutes that regulated the various higher education institutions at the time. The report envisioned a single co-ordinated higher education system based on co-operative governance and the principles of equity, democratisation, development, quality, academic freedom and institutional autonomy.[68]

It is significant that the *NCHE Report* was produced in only one year. It could be argued that a more extended period should have been spent on this endeavour.

The most important recommendations made by the NCHE were the following: an increase in student enrolment numbers and broadening access to education to a higher number of social groups and classes; greater responsiveness to societal needs and interests; increased levels of co-operation and collaboration in governance structures; a higher education system that is designed, managed and funded as one coordinated system representing universities, technikons and colleges; alignment of qualifications with the National Qualifications Framework; a strategic public funding framework; and the establishment of a higher education quality committee responsible for various functions including programme accreditation and institutional auditing and distance education.[69]

The *NCHE Report* was followed in 1997 by the publication of the Department of Education's *1997 White Paper.* The *1997 White Paper* responded to and formalised the recommendations contained in the *NCHE Report* by adopting them as government policy.[70]

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[68] *NCHE Report* 208 – 209; see also Grobbelaar J "Higher Education in South Africa: State Reform initiatives during the first decade of democracy" 2004(2) *JNGS* 38.

[69] Bitzer *Higher Education in South Africa* 13.

[70] Ferreira *A Framework for Continuous Improvement in the South African Higher Education Sector* 55; Fataar A "Higher education policy discourse in South Africa: a struggle for alignment with macro development policy" 2003(17) *SAJHE* 35.

2.2.2 The *1997 White Paper*

The Department of Education's Education *White Paper 3: A Programme for the Transformation of Higher Education* was published on 15 August 1997 following extensive investigation and consultation, initiated by the NCHE in February 1995 by President Nelson Mandela.[71] The *1997 White Paper* outlines the framework for the transformation of the higher education system as a single co-ordinated system.[72] The goal was to overcome the fragmentation that existed during the pre-1994 era and address the inequalities of the past.[73] The *1997 White Paper* detailed the role of planning, funding and governance of this single, co-ordinated system, which would include universities, technikons, colleges as well as private higher education providers.[74] In Chapter 1[75] of the *1997 White Paper*, the various challenges, vision and principles are discussed, while Chapter 2[76] focuses on the structure and growth of institutions. In paragraph 1.13, the *1997 White Paper* summarises transformation requirements as increased and broadened participation, responsiveness to societal interests and needs and cooperation and partnerships in governance.[77] The *1997 White Paper* formulates national goals in paragraph 1.27 and its institutional

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[71] *Government Gazette* Nr. 18207 (GN. 1196) 15 August 1997 3. Prior to the publication of the *1997 White Paper,* while the Draft White Paper on Higher Education appeared in April 1997 (*Government Gazette* Nr. 17944 (GN. 712) 18 April 1997).

[72] For more on the *1997 White Paper* see in general Fiske and Ladd *Elusive Equity: Education Reform in Post-Apartheid South Africa* 207; Mda and Mothata (eds) *Critical Issues in South African Education after 1994* 6 – 7; Bitzer (ed) *Higher Education in South Africa: A Scholarly look Behind the Scenes* 14 – 17; Cloete N and Bunting I *Higher Education Transformation: Assessing Performance in South Africa* (CHET 1999) 1 – 8; Gultig J "The University in Post-Apartheid South Africa: New Ethos and new Divisions" 2000(14) *SAJHE* 40 – 42.

[73] CHE *South African Higher Education in the First Decade of Democracy* (2004) 26.

[74] CHE *South African Higher Education in the First Decade of Democracy* 26; see in general, DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 14.

[75] *1997 White Paper* 7 – 15.

[76] *1997 White Paper* 17 – 34.

[77] *1997 White Paper* 10.

goals in paragraph 1.28. It also elaborates on institutional autonomy[78] and public accountability,[79] concepts that were neither defined nor discussed in the Higher Education Act of 1997. Both institutional autonomy and public accountability were listed as part of the fundamental principles that should guide the process of transformation.[80] The other principles include equity and redress, democratisation, development, quality, effectiveness, efficiency and academic freedom. Chapter 3[81] contains the governance model[82] for institutions, while Chapter 4[83] deals with funding.

The first sentence in clause 3.1 of the *1997 White Paper* states, *"*…..the transformation of the structures, values and culture of governance is a necessity, not an option, for South African higher education*".* The same clause ends in a promise by the Ministry[84] that governance will be a fundamental policy commitment.[85] Considering the various universities that have been placed under administration over the years, it is clear that the government has thus far not been successful in enforcing this promise.[86]

Chapter 3 of the *1997 White Paper* is of relevance to this research as it discusses the governance of higher education institutions. It provides the background to both the legislative framework as well as the institutional

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[78] Para 1.24 of the *1997 White Paper*.

[79] Para 1.25 of the *1997 White Paper*. Both these concepts are discussed in detail in para 2.4 below.

[80] Para 1.17 – 1.25 of the *1997 White Paper*.

[81] *1997 White Paper* 35 – 43. Governance is the focus throughout this research.

[82] Governance remains the focus throughout this thesis.

[83] *1997 White Paper* 45 – 55.

[84] At this stage, it was still the Department of Education, which was later changed to the Department of Higher Education and Training. Hereafter referred to as the "DHET".

[85] *1997 White Paper* 35.

[86] Governance at system level and institutional governance as contained in Chapter 3 are discussed in para 2.3.2 below.

governance framework for higher education institutions that were later incorporated in the Higher Education Act of 1997. The *1997 White Paper* was soon followed by the promulgation of the Higher Education Act of 1997, which provided the legal foundation for the policies that had been developed by the NHCE and confirmed in the *1997 White Paper*.[87]

2.2.3 The Higher Education Act of 1997

The Higher Education Act of 1997 (as amended) regulates higher education in South Africa.[88] The Act gave legal form to the values, principles and core policies underpinning higher education.[89] With the promulgation of this Act, the Minister of Education was given far-reaching powers to implement and enforce the structural changes needed for the transformation of the higher education system in South Africa.[90] The amendments to the Act relate to particular developments in higher education, notably, governance and financial crises at an institutional level during the 1990s, concerns about the quality of education provided by private higher education providers, and the plan to restructure the higher education landscape by implementing various mergers. Some of these amendments, and more specifically, the changes pertaining to the appointment of an administrator led to a degree

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[87] Ferreira *Framework for continuous improvement in the South African Higher Education sector* 56.

[88]This discussion centers on the Higher Education Act of 1997, including the Higher Education Training Laws Amendment Act of 2012 and the Higher Education Amendment Act of 2016. The Higher Education Act of 1997 was amended several times, by the Higher Education Amendment Act 55 of 1999; the Higher Education Amendment Act 23 of 2001; The Higher Education Amendment Act 63 of 2002; the Higher Education Amendment Act 38 of 2003; the Higher Education Act 39 of 2008; the Higher Education Laws Amendment Act 26 of 2010; the Higher Education Laws Amendment Act 21 of 2011; and the Higher Education and Training Laws Amendment Act 23 of 2012. For more on the Higher Education Act of 1997, see in general Mda and Mothata (eds) *Critical Issues in South African Education – After 1994* 12 – 13.

[89] CHE *South African Higher Education in the First Decade of Democracy* 29; see in general, the DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 15 – 16.

[90] Grobbelaar 2004(2) *JNGS* 41.

of unease amongst stakeholders. Fear of the threat to institutional autonomy began to rear its head.[91]

The Higher Education Act of 1997 replaced its predecessors, the Universities Act 61 of 1955, the Tertiary Education Act 66 of 1988 and the Technikons Act 125 of 1993. It did not repeal the Acts regulating private universities; these were only repealed in 2001, with the Higher Education Amendment Act 23 of 2001.[92] The Higher Education Act of 1997 consists of nine chapters, of which eight are applicable to public higher education institutions. For the purposes of this research, only chapters four and six are discussed in detail:[93]

- **Chapter 4** concentrates on the governance and regulation of these public institutions and is therefore of direct relevance to this research This chapter deals among other things with the composition of both the Senate and Council, committees, the Institutional Forum (IF), the role of principals of institutions as well as the institutional statutes and rules.[94] The chapter also deals with the Student Representative Council (SRC), student disciplinary action and admission to public higher education, as

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[91] CHE *South African Higher Education in the First Decade of Democracy* 29.

[92] A total of 108 Acts was repealed. *1997 White Paper* 36 - 37. There was a view that the repeal of the private university acts might be an assault on institutional autonomy. The Minister was of the view that this was not the case, however, the Minister instructed the CHE to investigate the matter. The private Acts were therefore only repealed in 2001.

[93] Chapter 1 deals with definitions, the application of the Act and determination of policy. Chapter 2 elaborates on the establishment of CHE, its functions and composition. Chapter 3 deals with the establishment of a public higher education institution, including the incorporation of sub-divisions of public higher education institutions. The chapter then continues to discuss the merger and closure of institutions. Chapter 5 of the Higher Education Act of 1997 deals with the funding of the public institutions, namely, the allocation of funds and records to be kept. Chapter 6A focuses on the establishment, functions and duties of national institutions for higher learning, while Chapter 7 discusses the registration of private higher education institutions. Chapter 8 includes general provisions such as the name change of a university, the seat of a public higher education institution, qualifications, limitation of liability of the CHE and the state and the delegation of powers. Chapter 9, the final chapter, outlines the transitional arrangement, which has now mostly been accomplished since the Act's promulgation in 1997.

[94] Similar to a company's memorandum of incorporation or founding document.

well as the co-operation among public higher education institutions. Notably, this chapter does not mention the core issues of governance, nor does it include any preventative measures to ensure good governance practices. Should one compare this chapter with the governance of companies as contained in Part F of the Companies Act of 2008, areas of improvement can be identified.[95]

- **Chapter 6** focuses on ministerial interventions and therefore bears direct relevance to this research. Since ministerial interventions in the affairs of public higher education institutions are reviewed and discussed. It includes the appointment, role and functions of an independent assessor appointed to a public higher education institution that is in distress,[96] as prescribed in the Higher Education Act of 1997. The chapter furthermore considers the situations where an independent assessor can be appointed, as well as the appointment of an administrator, his/her role, powers, functions and duties.

2.2.4 The National Plan for Higher Education

In 2001, the National Plan for Higher Education (NPHE) was published,[97] outlining the framework and the mechanisms for the implementation of the goals stipulated in the *1997 White Paper*. The National Plan for Higher Education calls for further investigation into what would constitute an appropriate institutional landscape for higher institutions.[98] The main aims of the NPHE are firstly to, ensure that higher education in South Africa achieved its transformation objectives formulated in the *1997 White Paper*;

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[95] A comparison of the governance of companies versus the governance of public higher education institutions follow in Chapter 4.

[96] Prescribed in s 45 of the Higher Education Act of 1997.

[97] *Government Gazette* Nr. 22138 (GN. 429) 9 March 2001. For more on the NPHE see Ntshoe IM "National Plan for Higher Education in South Africa: A Programme for Equity and Redress or Globalised Competition and Managerialism?" 2002(16) *SAJHE* 7 – 10.

[98] *NPHE Report* section 6.4; CHE *Higher Education Reviewed: Two Decades of Democracy* 2016 72.

secondly, to ensure that there was coherence in the provision of higher education at national level, thirdly, to ensure that all resources are used efficiently and effectively; fourthly, to ensure that there was accountability for the expenditure of public funds; and lastly, to ensure that the quality of academic programmes was approved.[99] The drafting of the NPHE was informed by the institutional planning process, which had already commenced in 1998. It was further influenced by the higher education trends of the Department of Education, the report of the CHE as well as the responses of the various public higher education institutions.[100]

The restructuring of higher education in South Africa also included various mergers of public institutions.[101] On 25 May 2001, the implementation plan for the NPHE was published.[102] This plan made provision for a National Working Group to be established to advise the Ministry. The Working Group was also tasked with investigating the restructuring of higher education to ensure that it contributes to the NPHE.[103] The NPHE did not specifically deal with governance higher education at that time, as arguably, this was not a key priority at the time.

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[99] *NPHE Report* 13.

[100] CHE "Towards a New Higher Education Landscape: Meeting the Equity, Quality and Social Development Imperatives of South Africa in the 21st Century" (June 2000).

[101] Some of the mergers that took place included the Rand Afrikaanse University and Technikon Witwatersrand which then formed the University of Johannesburg (*Government Gazette* r. 25737 (GN. 1702) 14 November 2003; the University of Natal and the University of Durban-Westville which formed the University of Kwa-Zulu Natal (*Government Gazette* Nr. 25737 (GN. 1688) 14 November 2011.

[102] *Government Gazette* Nr. 22329 (GN. 466) 25 May 2001.

[103] *Government Gazette* Nr. 22329 (GN. 466) 25 May 2001 4.

2.2.5 Guidelines for good governance practice and governance indicators for Councils of South African Public Higher Education Institutions

This document was issued by the Department of Higher Education and Training in December 2017 with the aim of improving good governance of university Councils. However, these guidelines appear to be a set of principles for Councils to improve their efficiency, effectiveness and accountability; they do not constitute a statutory document.[104] One of the reasons for the need for these guidelines was the fact that several universities had been placed under administration over the past few years, some of them more than once. These institutions were placed under administration as a result of independent assessors' reports highlighting various governance, administrative and management failures.[105] The guidelines also highlighted the fact that other than the *1997 White Paper* and the Higher Education Act of 1997, no other governance standards had been provided to public higher education institutions to assist them in establishing appropriate norms and standards of governance. In the absence of such guidance, public higher education institutions were relying on the *King Reports of Good Corporate Governance*.[106] The principles of *King III* are applied in the *2014 Reporting Regulations*.[107] *King IV* refers to a "governing body" instead of a "company" because its principles are applicable to all sectors and entities.[108] There is a clear need for proper governance principles aimed specifically at public higher education

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[104] DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 11.

[105] DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 9 – 10. See Chapter 3, para 3.3.2 below for a discussion on these failures in governance in South African universities.

[106] The history of the *King Reports* is discussed in Chapter 4, para 4.4.3 below.

[107] Since then, *King IV* was introduced in 2017. *King IV* is discussed in Chapter 4, para 4.4.3 below.

[108] *King IV* is discussed in more detail in Chapter 4, para 4.4.3 below.

institutions. The need for improved governance practices is recognised in the DHET's *guidelines for good governance practices and governance indicators for Councils of South African Public Higher Education Institutions*. However, only three recommendations are made in this regard. The DHET's *Guidelines for good governance practice and governance indicators for Councils of South African Public Higher Education Institutions* was created with the aim of improving governance practices in higher education institutions.[109] The major part of the document is devoted to highlighting governance inefficiencies and problems, whereas only three short recommendations are made. It is posited that these recommendations are inadequate, and more significant effort should have been made to provide clear and specific guidelines.[110] Furthermore, as reflected in the title of the document, it is intended only for Councils. This excludes its application to the day-to-day management or operational matters of the institution; which responsibilities fall to the Vice-Chancellor and the executive management.[111] It is therefore proposed that provision be made for the accountability of executive management. *King IV* defines accountability as follows: "It is the obligation to answer for the execution of responsibilities. Accountability cannot be delegated, whereas responsibilities can be delegated without abdicating accountability for that delegated responsibility."[112] The difference between accountability and responsibility is that the former can be shared while the latter cannot be shared. Accountability is one of the cornerstones of good governance. According to Stapenhurst and O'Brien, accountability can be described as the relationship between an individual or body and the functions performed by this individual or body are subject to another person or body's oversight.

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[109] DHET "Guidelines for good governance practices and governance indicators for Councils of South African public higher education institutions" December 2017 4.

[110] See Chapter 6 below for all the recommendations pertaining to the Higher Education Act of 1997 and the *2014 Reporting Regulations*.

[111] Section 30 of the Higher Education Act of 1997.

[112] *King IV* 9.

The individual or body conducting the functions must divulge information or justify their actions. Accountability in governance is important, as ongoing evaluation will ensure that officials perform effectively.[113] Responsibility is defined in *King IV* as "taking ownership of a duty, obligation or liability."[114]

Both accountability and responsibility form part of principle one of *King IV*. Council members and the executive management are therefore responsible for the execution of their responsibilities even if they were delegated. Moreover, Council members and the executive management of a higher education institution must exercise their duties in the best interest of the institution.[115] The governance distinction between responsibility and accountability is that responsibility can be shared while accountability cannot be shared. Therefore, the Council may delegate their responsibility, but will ultimately remain accountable for all decision making.

Although the publication of these guidelines was a commendable initiative, the document only contains three short recommendations.[116] The first recommendation propose that the scorecard provided in the *Guidelines* be submitted to the DHET as part of the university's annual performance plan. This seems to be a sound proposal. The second recommendation relates to the separation of the institution's institutional statute and its institutional

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[113] Stapenhurst R and O'Brien M "Accountability in Governance" World Bank 1; see also Crowther D *et al.* (eds) *Governance, Accountability and Sustainable Development* (Cambridge Scholars Publishing 2015) 103; Kaler J "Responsibilities, Accountability and Governance" 2002(11) *Business Ethics: A European Review* 328.

[114] *King IV* 16; Kaler suggests that if someone's "responsibilities" are referred to, reference is made to a situation where something happened or failed to happen. The consequences of the actions of a person's responsibilities can be either positive or negative. When the consequences are positive, the responsible person might receive praise and a reward: when it is negative, the person might receive blame and possible punishment: Kaler 2002(11) *Business Ethics: A European Review* 327 – 328.

[115] *King IV*, principle 1.

[116] For these recommendations, see DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 68.

rules. Institutions can then incorporate provisions of good governance and competency frameworks in their institutional rules. The last recommendation states that the DHET will review the standard institutional statute.[117] Furthermore, the DHET indicates that it may seek to amend the Higher Education Act of 1997 to provide for smaller Councils, as larger Councils have hampered effective governance in higher education institutions.[118]

2.3 GOVERNANCE FRAMEWORK OF A HIGHER EDUCATION INSTITUTION

2.3.1 Legislative framework

The Department of Education was established as part of the post-1994 government. In May 2009, it was divided into two departments: the Department of Basic Education (DBE)[119] and the Department of Higher Education and Training.[120] The formal separation of the two departments took effect on 1 April 2010.[121] Higher education in South Africa includes

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[117] To view the scorecard, see DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 55 – 66.

[118] DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 68. Smaller Councils might be more effective since fewer members on a Council might work better together in the best interest of the institution. Larger Councils provide for a larger pool of people who will disagree with one another and tend to be less effective.

[119] See more on the Department of Basic Education on http://www.education.gov.za/TheDBE/AboutDBE/tabid/435/Default.aspx (Date of use: 17 May 2018). The DBE is tasked with all primary and secondary education in South Africa.

[120] The DHET is responsible for higher education in South Africa. Section 1 of The Higher Education Laws Amendment Act 26 of 2010 amended the Higher Education Act of 1997 to change the definition of "Department of Education" to "Department of Higher Education and Training" and "Minister" to "Minister of Higher Education and Training".

[121] *Presidential Minute No*. 690 (6 July 2009).

public and private higher education institutions.[122] The current system of governance of public education was formally established in the Higher Education Act of 1997. The DHET derives its mandate from section 29 of the Constitution, which lists education at all levels, including tertiary education, as a functional area of concurrent national and provincial legislative competence.[123] The promulgation of the Higher Education Act of 1997 led to the repeal of various Acts, which in turn resulted in a more co-ordinated and structured framework.[124]

There are two other statutory bodies involved in the governance of higher education institutions in South Africa: the Council of Higher Education (CHE)[125] with its Higher Education Quality Committee (HEQC), and the South African Qualifications Authority (SAQA).[126] SAQA was initially established in terms of the South African Qualifications Authority Act 58 of 1995[127] but is now governed by the National Qualifications Framework Act

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[122] Section 20 of the Higher Education Act of 1997 (public) and s 51 of the Higher Education Act of 1997 (private). This study focuses on public higher education institutions; however, a brief overview is provided of the structure of private higher education institutions since the Companies Act of 2008 is applicable to these institutions (but is not applicable to public higher education institutions). The Companies Act of 2008 contains a partial codification of director's duties. It is recommended that the Higher Education Act of 1997 be amended to include similar provisions as the Companies Act of 2008.

[123] For more on the Department of Higher Education and Training, see http://www.dhet.gov.za/SitePages/AboutUS.aspx (Date of use: 17 May 2018).

[124] Section 76 of Higher Education Act of 1997.

[125] A statutory body in terms of s 4 of the Higher Education Act of 1997.

[126] Established in terms of s 3 of the South African Qualifications Authority Act 58 of 1995.

[127] Hereafter referred to as the SAQA Act. The South African Qualifications Authority Board is a body of 12 members appointed by the Minister of Higher Education and Training. This Act was repealed in terms of s 37 of the National Qualifications Framework Act 67 of 2008. Its mandate is to advise the Minister of Higher Education and Training on NQF matters in terms of the NQF Act. SAQA must also perform its functions subject to the NQF Act and oversee the implementation of the NQF as well as to ensure the achievement of its objectives. See the NQF Act for more detail pertaining to their functions. This study does not focus on SAQA as this is not relevant to the purposes of the research. For more on the South African Qualifications Authority (SAQA), see http://www.saqa.org.za/show.php?id=5658 (Date of use: 17 May 2017).

67 of 2008.[128] CHE was established in 1997 as a statutory body to provide independent advice to the Minister relating to matters of transformation and development of higher education and to manage quality assurance. Chapter 3 of the Higher Education Act of 1997 provided for the establishment of the CHE, its mandate and functions. In terms of the Higher Education Act of 1997, the Minister is obliged to accept the advice provided by the CHE or offer reasons for not accepting such advice.[129] The CHE plays an essential regulatory and advisory role in the governance of higher education institutions, and all indications are that it will continue to play this critical role in the future.

Another role player within the legislation framework of higher education is Higher Education South Africa (HESA), which was formed on 9 May 2005, and was the successor to the two statutory representative bodies for universities and the former technikons.[130] HESA subsequently changed its name to Universities South Africa (USAf), a membership organisation representing South Africa's universities.[131] Although USAf is not a statutory body and has no status in law, it serves an essential function in areas such as strategic research, stakeholder engagement and sector support. Higher education in South Africa went through significant restructuring during 2004 and 2005, which involved mergers of universities and technikons and the creation of the new comprehensive universities. USAf's mandate is to facilitate the development of informed public policy on higher education and to encourage cooperation between universities and government, industry and other sectors of society in South Africa.[132] When the Higher Education Act of 1997 was amended in 2012, many organisations like USAf

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[128] Hereafter referred to as the NQF Act. Its objectives are listed in s 5 of the NQF Act.

[129] *1997 White Paper* 39.

[130] Technikons are now universities of technology.

[131] For more on USAf, see https://www.usaf.ac.za/ (Date of use: 17 May 2018). Its name changed on 22 July 2015.

[132] For USAf's mandate, see https://www.usaf.ac.za/ (Date of use: 17 May 2018).

felt excluded from the participation process.[133] This resulted in the establishment of the Legal Advisory Committee at USAf, which is responsible for technical comment on draft legislation that has a direct impact on higher education. It also advises USAf on the impact of specific pieces of legislation on the functioning of institutions.[134]

It is clear that the legislative framework of higher education post-1994 has undergone dramatic changes. Not only is there more structure, but organisations like USAf and the CHE have been established to assist institutions and to facilitate the relationship between the institutions and government, an area which was previously lacking.

2.3.2 Institutional governance

The *1997 White Paper* made it patently clear that all universities must manage their own affairs. In terms of section 20(4) of the Higher Education Act of 1997, every public university is a juristic person. Although the Higher Education Act of 1997, together with a university's institutional statute[135] and the reporting regulations[136] for public higher education institutions, is the only governing legislation for these institutions, it differs slightly for private higher education institutions. Registration for public higher education institutions takes place in accordance with section 51 of the Higher Education Act of 1997. However, for an institution to be recognised as a private higher education institution, it needs to be registered as a juristic entity in terms of the company laws[137] of South

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[133] It is unclear why HESA felt excluded, as it was in fact included in the agenda for the public hearings held on 11 September 2012.

[134] For more on USAf's Legal Advisory Committee and its mandate, see https://www.usaf.ac.za/governance-structures/ (Date of use: 17 May 2018).

[135] Section 33 of the Higher Education Act of 1997.

[136] The *2014 Reporting Regulations* are discussed in Chapter 4, para 4.4.4 below.

[137] Companies Act of 2008.

Africa.[138] Private higher education institutions are required to comply with the Companies Act of 2008 as well as limited provisions in the Higher Education Act of 1997. Private higher education institutions must also comply with the Department of Higher Education and Training's *Regulations for the Registration of Private Higher Education Institutions*.[139] The Higher Education Act of 1997 is prescriptive with regards to public higher education institutions since they obtain most of their funding from government, yet, it is less so with regards to private institutions which are primarily regulated by the Companies Act of 2008 and are privately funded.[140] It is essential to understand the difference between private and public higher education institutions and the fact that due to their public nature, public higher education institutions will always be publicly accountable. One of the most significant differences between public and private higher education institutions is the level of institutional governance prescribed for public higher education institutions and not for private institutions. The latter framework prescribed by the Higher Education Act of 1997 is a set of formal governance structures for public institutions like the Council, Senate, Institutional Forum (IF) and Student Representative Council (SRC).[141] There are no similar requirements for private higher education institutions.

(a) Private higher education

Although the focus of this thesis is not on private higher education, it is briefly referred to as the Companies Act of 2008 applies to private higher education institutions. The Companies Act of 2008 provides a clear

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[138] Section 51(1)(a)(b) of the Higher Education Act of 1997. It is important to note that public institutions are not subject to the Companies Act 2008.

[139] *Government Gazette* Nr.39880 (GN. 383) 31 March 2016. These regulations were published to assist with entities that want to register private higher education institutions.

[140] Private higher education is discussed in para 2.3.2(a) below.

[141] CHE *Higher Education Reviewed: Two Decades of Democracy* 2016 110.

mandate for directors and the management of the company. Furthermore, it provides for a standard of conduct for directors as well as liability in the event of a breach of the duties owed to the company. Moreover, the Companies Act of 2008 also provides for the removal of an errant director. All of these statutory provisions assist in improving corporate governance practices in companies, and similar provisions will be beneficial to public higher education institutions.[142] The end of Apartheid saw a rapid growth in private higher education in South Africa.[143] Private higher education institutions are discussed in Chapter 7 of the Higher Education Act of 1997. Section 51 of the Higher Education Act of 1997 provides that no person other than a public higher education institution or an organ of state may provide higher education unless that person is registered or conditionally registered in terms of the Higher Education Act of 1997 and registered as a juristic person in terms of the Companies Act of 2008. In terms of section 50 of the Higher Education Act of 1997, the Director-General is the Registrar of private higher education institutions. The Minister may furthermore designate any employee of the DHET to assist the Registrar in the performance of his/her duties. All applications for the registration of private higher education institutions must be made to the Registrar[144] , and these institutions will only be registered if they comply with the prescribed requirements for registration.[145]

There is no need for the Higher Education Act of 1997 to deal with private institutions in detail as they are registered as companies and accordingly

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[142] See a discussion on these provisions contained in the Companies Act of 2008 in Chapter 4, para 4.2 below.

[143] See in general, Mabizela M "The evolution of private provision of higher education in South Africa" 2002(20) *Perspective in Education* 41 – 51; CHE *Higher Education Reviewed: Two Decades of Democracy* 2016 84.

[144] Section 52 of the Higher Education Act of 1997.

[145] Section 53 of the Higher Education Act of 1997. See also *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (B) and *Niekara Harrielall v University of Kwazulu-Natal* 2017 ZACC 38; 2018 1 BCLR 12 (CC) for examples of case law confirming that a university is an organ of state.

managed as such. This consequently implies that the governance of these institutions must comply with the provisions of the Companies Act of 2008. There is no administration process for private higher education institutions, and when such institutions are mismanaged or fall on hard times, they are dealt with in the same way as any other company, which, in many instances could lead to liquidation proceedings. It is also important to note that the HEQC of the CHE is also responsible for the accreditation of the academic programmes of these private higher education institutions.

It should be noted that although the Higher Education Act of 1997 is less prescriptive towards private higher education, this sector is still closely monitored by the DHET. Although the DHET cannot intervene in any of these private institutions, it is within its power to withdraw the registration certificate of a private higher education institution in the event of non-compliance with any provisions of the DHET. This would preclude the institution from offering any services to students. In the event of an application for liquidation, the DHET, through the CHE, would form a task team to investigate and make a recommendation to the Minister. However, the DHET would not have any role to play in the liquidation proceedings of these private higher education institutions.

(b) Public higher education

As stated earlier, the Higher Education Act of 1997 is more prescriptive with regards to the governance of public education institutions due to them being funded by the government. As stipulated in the 1997 *White Paper*, it is the responsibility of higher education institutions to manage their own affairs; the DHET does not intend to micro-manage these institutions and promotes institutional autonomy.[146] Section 26 of the Higher Education Act of 1997 specifies that the institutional governance structure of a higher

[146] This is where an institution has a certain degree of self-regulation and administrative independence.

education institution contains a Council, a Senate, a Principal, a Vice-Principal, a Student Representative Council and an Institutional Forum and such other structures and offices as may be determined by the institutional statute of a higher education institution.[147] Even as far back as the Van Wyk de Vries Commission in 1972, the Council and the Senate have been perceived as the two most crucial management structures of a university.[148] The Council is the supreme decision-making body of a university and is ultimately responsible for the governance of the institution while the Senate is the highest decision-making body on academic matters. Senate reports to Council.[149]

For the purposes of this research, several institutional statutes of public higher education institutions were reviewed. The information relating to the Council, Senate, IF and SRC contained in these institutional statutes is discussed in the paragraphs below.

(i) The Council

In terms of section 27 of the Higher Education Act of 1997, each university must establish a Council. The Council must govern the institution subject to the Higher Education Act of 1997 as well as the institutional statute of that institution. It is the responsibility of each Council to oversee order and good governance at the institution.[150]

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[147] Institutional statutes and institutional rules are made in compliance with s 32 of the Higher Education Act of 1997. This is discussed in more detail below.

[148] *Van Wyk de Vries Commission Report* 109.

[149] Section 28(1) of the Higher Education Act of 1997. See in general, Cloete *et al. Transformation in Higher Education: Global Pressures and Local Realities in South Africa* 233.

[150] Section 27 of the Higher Education Act of 1997.

The Higher Education Act of 1997 dictates the appointees of the Council as follows:[151] the Principal of the institution, the Vice-Principal of the institution, not more than five appointees by the Ministry, members of Senate elected by the Senate, academic employees of the institution elected by such employees, students of the institution elected by the SRC, employees other than academic employees elected by such employees and such additional persons as may be determined by the institutional statute of that institution. The Higher Education Act of 1997, by way of each university's institutional statute, provides considerable leeway in constituting the external membership of a Council by specifying only that direct ministerial appointments to the Council be limited to a maximum of five members,[152] thereby preventing Councils from being controlled by state representatives.[153] It further specifies that members of the Council "…..must be persons with knowledge and experience relevant to the objectives and governance of the public higher education institution concerned,"[154] and that they "must participate in the deliberations of the Council in the best interest of the public higher education institution concerned."[155] By determining the composition of a Council, the Higher Education Act of 1997 ensures that there is broad-spectrum participation among the various stakeholders as well as co-operative governance. However, taking into consideration that the Council of a university is the highest decision-making body, similar to a board of directors of a company, it is concerning that, it includes students and other employees who may not have the relevant insight, qualification or experience. It may be questioned whether it is wise to have students form part of a university Council when they may not have the required

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[151] Section 27(4) of the Higher Education Act of 1997.

[152] Section 27(4)(c) of the Higher Education Act of 1997.

[153] CHE "Governance in South African Higher Education" 2002 36.

[154] Section 27(7)(a) of the Higher Education Act of 1997; see DHET "Guidelines for good governance practice and governance indicators for Councils of South African Public Higher Education Institutions" December 2017 37 – 39 for their suggestions on membership criteria.

[155] Section 27(7)(b) of the Higher Education Act of 1997.

maturity nor qualifications to make sound decisions in the best interests of the institution and whether participation should not be via another forum.[156] Case studies conducted by the CHE and USAf suggest that larger Councils are difficult to manage and to maintain cohesion of. In fact, large Councils are prone to factionalism and absenteeism. In some cases, Vice-Chancellors have indicated that consensus in strategic debates in large Councils has been difficult to achieve and they have accordingly proposed smaller Councils. The size of a Council is dependent on how its internal membership is constituted: if each category of internal representatives has only one representative, the Council size might range between 20 and 24 members and therefore still adhere to the 60% rule.[157] This can be determined in the institutional statute of each institution in terms of section 27(5). Each institution is therefore able to determine the size of its Council. In agreement with both CHE and USAf, it is thus posited that Council sizes should be smaller.

The functions and responsibilities of a Council can be summarised as follows:[158] formulating the institution's mission and purpose; appointing the

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[156] During the last decade, public higher education institutions were faced with student protests and picketing, in some instances the institutions had to close some or all of their campuses. It is concerning that in some instances some SRC members partake in the protests. It may be that the same SRC members sitting on the Council are also participating in the student unrest. See in general, Luesher-Mamashela TM "Student Representation in University Decision Making: Good Reasons, a new Lens?" 2013 (38) *Studies in Higher Education* 1445 – 1454; CHE *Higher Education Reviewed: Two Decades of Democracy* 2016 50 – 51.

[157] Section 27(6) of the Higher Education Act of 1997; DHET "Guidelines for good governance and governance indicators for Councils of South African Public Higher Education Institutions" December 2017 29.

[158] The functions and responsibilities listed here are a combination of the functions and responsibilities contained in the institutional statutes of ten public universities. Although there are twenty-six public universities, some of them use a standard institutional statute. The ten institutional statutes were selected from public universities that have customised institutional statutes and consist of a mix of comprehensive universities as well as universities that were recently established. These institutional statutes differ from one another. However, as long as they comply with the provisions of the Higher Education Act of 1997, they may differ from one another. See DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 40 – 42 for their discussion on the functioning of council as well as the primary functions of the Council.

Vice-Chancellor and other senior management; evaluating and supporting the Vice-Chancellor; assuring proper management; being accountable for financial resources and institutional assets; monitoring the transformation process; assuring student access and success; assuring order and a safe campus environment; maintaining institutional autonomy; setting up and serving on council committees and taking stock of the Council's own performance.[159] One of the responsibilities of the Council is to ensure that the institution is well managed and to maintain order and governance of institutions. However, it is not the function of the Council to micro-manage the institution by involving itself in the day-to-day management of the institution; this is the responsibility of the executive management led by the Vice-Chancellor.[160]

According to Ncayiyana and Hayward, there are various ways in which a Council can ensure that the institution is well managed. The Council should ensure that it hires executive leaders with integrity, dedication, loyalty and excellent managerial skills in addition to the skills and experience required for the specific position. The Council has the authority to reject appointments that do not meet criteria and would therefore not be in the best interests of the institution. The Council should have a firm grasp of its responsibilities as the overseer of resources, the ultimate employer of all staff and, through the Senate, the overseer of student admission policies and academic programmes. The Council should insist on regular reports (at every Council meeting) from the Vice-Chancellor on the state of the institution, accompanied by appropriate analyse and data, including full financial disclosure discussed at least on a quarterly basis. The Council should satisfy itself that financial and other management systems are in

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[159] Ncayiyana DJ and Hayward FM *Effective Governance: A Guide for Council Members of Universities and Technikons* (CHET South Africa 1999) 9. Two of these functions should be discussed in more detail, i.e. ensuring good management and preserving institutional autonomy as these have direct bearing on the current research.

[160] DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 21.

place and ensure that the institution conforms to the provisions of the Higher Education Act of 1997 and other requirements prescribed by the DHET and the CHE. Councils of higher education institutions should assiduously guard the autonomy of institutions. The Higher Education Act of 1997 affirms autonomy against undue interference by the state or other external influence. [161]

For the purposes of this research, the institutional statutes of various universities have been reviewed. Of the 26 public universities, only two institutional statutes make reference to fiduciary relationships.[162] It confirms the common law position that a member of a Council has a fiduciary relationship with the university. According to these statutes, a member of a Council must promote the interests of the university, act in good faith and with due care and skill. These are similar to the fiduciary duties of directors, as confirmed in section 76 of the Companies Act of 2008. [163]

(ii) The Senate

In terms of section 28 of the Higher Education Act of 1997, each university must establish a Senate which is accountable to the Council for the academic and research functions of public higher education institutions.[164] The Senate comprises the following: the Principal, the Vice-Principal(s), academic employees of the institution, employees of the institution other

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[161] Section 34 of the Higher Education Act of 1997; the institutional statute of each public higher education institution. See also Ncayiyana and Hayward *Effective Governance: A Guide for Council Members of Universities and Technikons* 9.

[162] It is impossible to summarise the institutional statutes of all existing universities in this thesis; therefore, the researcher considered three institutional statutes of public higher education institutions and summarised the content for the purposes of this chapter. These institutional statues were chosen from public universities that have customised institutional statutes and comprises of traditional and comprehensive universities.

[163] See Chapter 4, para 4.2.5 below for a discussion on fiduciary duties in terms of the Companies Act of 2008.

[164] Section 28(1) of the Higher Education Act of 1997.

than academic employees, members of the Council, members of the SRC and such additional persons as may be determined by the institutional statute of the institution.[165] The majority of the members of a Senate must be academic employees of the public higher education institution concerned.[166]

According to section 29 of the Higher Education Act of 1997, Council and Senate may establish committees to perform any of their functions and may also appoint any person as a member of such committees.[167] A Senate may not take decisions in a political or economic vacuum; it should take into account the impact its decisions will have on those it will affect. The Higher Education Act of 1997 clearly distinguishes between the matters the Council may decide upon "after consultation" with Senate and matters that can only be resolved if Senate "concurs" with the Council.[168]

A Senate should also take into account the purpose of a university when making its decisions.[169] The functions and responsibility of a Senate can be summarised as follows:[170] providing academic leadership and debating matters of academic principle; promoting an institutional culture of high academic and ethical standards; ensuring the academic quality of programmes, research and community engagement activities; determining and recommending to the Council policy regarding admission, teaching, learning, assessment, research, quality assurance, community engagement

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[165] Section 28(2) of the Higher Education Act of 1997.

[166] Section 28(4) of the Higher Education Act of 1997.

[167] Section 27(1) of the Higher Education Act of 1997.

[168] DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 21.

[169] Morrow W *Bounds of Democracy: Epistemological access in higher education* (Human Sciences Research Council 2009) 108.

[170] For the purposes of this research, three universities were chosen whose institutional statutes were compared and a combined summary of the functions of the Senate was provided.

and other matters that form part of its functions; co-determining with the Council the language policy of the university; determining guidelines for the appointment and promotion of academic employees, advising the Council in this regard and making recommendations on the appointment of academic employees; determining and submitting recommendations to the Council on the organisation and structuring of teaching, learning, research and community engagement; determining and submitting recommendations to the Council on the introduction or suspension of degrees, diplomas, certificates, programmes, courses and subjects as well as making recommendations pertaining to each school, college or faculty, including the establishment or disestablishment of schools, colleges or faculties; determining the rules for degrees, diplomas, certificates and other academic programmes; considering and approving recommendations from its committees, including faculty boards; ensure legal compliance in regard to academic matters; determining and recommending to the Council on matters related to academic development and support services, professional specialist services for students, student discipline, the constitution of the SRC and other student matters of an academic nature; determining and submitting recommendations to the Council on matters delegated or entrusted by the Council; establishing committees to promote its functions; determining the principles, conditions and criteria for the award of scholarships and academic prizes; supervising and controlling all examinations held by the university, in accordance with the provisions laid down by the Senate; making recommendations as to membership positions of the various faculty boards; and fulfilling such other functions and tasks as determined by the Council. Scrutiny of the various institutional statutes of the various public universities has revealed that only one institution's statute confirms the fiduciary relationship between its Senate and the university.

(iii) The Institutional Forum

The role of the Institutional Forum (IF) is to advise the Council on issues affecting the institution such as the implementation of the Higher Education Act of 1997 and the national policy on higher education; race and gender equity policies; the selection of candidates for senior management positions; codes of conduct, mediation and dispute resolution procedures; the fostering of an institutional culture which promotes tolerance and respect for fundamental rights and creates an appropriate environment for teaching, research and learning; and performing such functions as determined by the Council.[171] The IF is required to consist of the following representatives: the management as determined by the institutional statute; the Council; the Senate; academic employees; employees other than academic employees; students; and any other category determined by the institutional statute.[172]

It should be noted that the IF does not have decision-making powers and is not able to override any decisions made by either the Council or Senate. However, the amended Higher Education Act of 1997, now stipulates that the Council must consider the IF's advice or provide written reasons if the advice is not accepted.[173]

(iv) The Student Representative Council

In terms of section 35 of the Higher Education Act of 1997, the establishment and composition, manner of election, term of office, functions and privileges of the Student Representative Council (SRC) must be determined by the statute and rules of each institution. The SRC is

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[171] Section 31(1) of the Higher Education Act of 1997.

[172] Section 31(2) of the Higher Education Act of 1997.

[173] Section 31(1A) inserted by s 9 of the Higher Education Amendment Act of 2016. See Chapter 3, para 3.4.2 for a discussion on the amendments to s 31(2) of the Higher Education Act of 1997 relating to the IF.

accountable to the Council, the Vice-Chancellor/Rector and the student body/community. The functions and powers of the SRC can be summarised as follows:[174] representing the student community and acting in its interest concerning relevant academic and non-academic matters; supporting and upholding the vision, mission, values and goals of the university; liaising with Council, Senate, the Vice-Chancellor/Rector and management, the SRC of other institutions and the general public; promoting student participation in student affairs; and promoting academic diligence and excellence among students. As already mentioned above, it is suggested that the role and effectiveness of the SRC should be revised to ensure that this body operates effectively and in the best interests of its higher education institution. The SRC is not discussed further, but SRC members who are also members of Council will be subject to the rules that apply to Council members generally.

(v) Management

In terms of section 32 of the Higher Education Act of 1997, a Council of a university *may* make an institutional statute subject to section 33. Section 32(2) is prescriptive and states:

> An institutional statute or institutional rules in connection with the composition of the Senate may not be amended or repealed except after consultation with such Senate; the academic functions of the public higher education institution concerned, including the studies, instruction and examinations of students and research may not be made, amended or repealed except with the concurrence of the Senate of such institution; the composition of the students' representative Council may not be amended or repealed except after consultation with such students' representative Council; and the disciplinary measures and disciplinary procedures relating to students, may not be made except after consultation with the Senate and the SRC of the public higher education institution concerned.

[174] For the purposes of this research, three universities were chosen whose institutional statutes were compared and a combined summary of the functions of the SRC is provided.

Section 33 confirms that all institutional statutes of public higher education institutions *must* be submitted to the Minister for approval. If the institutional statute is approved, it must be published in the *Government Gazette,* and will then come into operation on the date mentioned in the notice.

According to section 29 of the Higher Education Act of 1997, the Council and Senate of a public higher education institution may each establish committees to perform any of their functions and may appoint persons who are not members of the Council or the Senate as members of the committees.[175] The composition, manner of election, functions and procedures at meetings and the dissolution of a committee or joint committee are determined by the statute or rules of the institution.[176] It is important to reiterate that section 30 of the Higher Education Act of 1997 confirms that the Principal of a public higher education institution is responsible for the management and administration of that institution. Since the Higher Education Act of 1997 provides minimal prescriptions as to the content of institutional statutes, the statutes of public higher educations, as well as the committees in these institutions, may differ from institution to institution.[177] As long as the institutional statute complies with the provisions of the Higher Education Act of 1997, the content of the statute may vary among institutions to fit the needs of each entity. Except for differences in the terminology of certain designations, the management structures of a university look very similar. The institutional statutes clarify, for example, the roles and responsibilities of senior management such as

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[175] Section 29(1) of the Higher Education Act of 1997.

[176] Section 29(4) of the Higher Education Act of 1997.

[177] For the purposes of this research, three universities were chosen whose institutional statutes were compared to see the composition of the institutions, the committees established and how they are managed in terms of these institutional statutes. Since there are currently 26 institutions, it was not possible to compare all of these institution's statutes.

the Vice-Chancellor/Rector, Vice-Chancellor/Vice-Rector, Registrar and Dean.

(vi) Functions of the Chancellor

The manner in which the Chancellor is elected is prescribed in the institutional statute of each public university. As the titular head of the university, the Chancellor has no executive powers. The functions of a Chancellor can be listed as follows: conferring all university degrees and awarding all diplomas and certificates of the university; constituting and dissolving congregations of the university; performing such other functions on behalf of the university as assigned to him/her by the Council, and at all times embodying the aspirations and values of the university and actively advancing the interests of the university. In the absence of the Chancellor, the Vice-Chancellor/Rector performs the functions of the Chancellor; in the absence of the Vice-Chancellor/Rector, the Deputy Vice-Chancellor/Deputy Rector will perform the functions.[178]

(vii) Functions of the Vice-Chancellor/Rector

The Vice-Chancellor/Rector is appointed by the Council. Together with the executive management of the institution, this role is responsible for the management and operational requirements of the institution.[179] The main functions of the Vice-Chancellor/Rector can be listed as follows: he/she is the Principal, chief executive and accounting officer of the university; the Vice-Chancellor/Rector is the legal, administrative and academic head of the university; the Vice-Chancellor/Rector reports to Council; the Council may assign additional duties to the Vice-Chancellor/Rector; by virtue of his/her office, the Vice-Chancellor/Rector is a member of all committees of

[178] These duties are a summary from the three institutional statutes used for the purposes of this research.

[179] DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 23.

the Council and Senate, unless Council determines otherwise; in the absence of the Chancellor, the Vice-Chancellor/Rector may exercise any official duty of the Chancellor and he/she may delegate any functions, duties and powers to a member of management. In one of the institutional statutes that was reviewed for the purposes of this research, it is stipulated that the Vice-Chancellor candidate must be a person who is not disqualified from acting as a Vice-Chancellor/Rector in accordance with the legislation regulating the governance of companies[180] listed on the Johannesburg Stock Exchange (JSE),[181] and must have knowledge and experience relevant to the objectives and governance of the university; and be appropriately academically qualified. This will ensure that a duly qualified person occupies this essential managerial role.

(viii) Functions of the Deputy Vice-Chancellor/Deputy Vice-Rector

The deputy Vice-Chancellor/Deputy Vice-Rector and the Registrar are appointed by Council. They are accountable to the Vice-Chancellor/Rector. Their functions can broadly be listed as follows:[182] assisting the Vice-Chancellor/Rector with the management, administration, supervision and control of the university; maintaining responsibility for the portfolios and functions allocated to them by the Vice-Chancellor/Rector and which are approved by Council; and, should the position of a deputy Vice-Chancellor/Deputy Vice-Rector and Registrar become vacant, appointing an official to perform those duties until that position is filled. At this juncture, it is essential to mention that the Registrar also fulfils the functions of the university secretariat.

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[180] Companies Act of 2008.

[181] For a discussion on the JSE, see Chapter 4, para 4.4.2 below.

[182] For the purposes of this research, three universities were chosen whose institutional statutes were compared and a combined summary of the functions of the Vice-Chancellor is provided.

(ix) The role of the Registrar

As indicated above, the Council is tasked with overseeing the governance of the university. According to the DHET, the institutional statute and/or institutional rules must make it clear that the Registrar is the secretary of both the Council and the Senate.[183] In reviewing the various institutional statues that were selected for the purposes of this research, it was inferred that the Registrar plays an essential role in the legal and governance compliance management within the university. The various statutory bodies and other structures within a university play a significant role in compliance management.[184] According to the institutional statutes of the universities, the Registrar's roles and responsibilities can be summarised as follows: to act as secretariat to Council and to provide support to other governance structures of the institution; to act as compliance officer for the institution; to attend to nominations and elections; to shoulder responsibility for administrative support of the convocation, academic administration of the institution and records management. It is recommended that the Higher Education Act of 1997 is amended to clarify that the Registrar is also responsible for compliance and governance.[185]

In 2012, Barac and Marx undertook a study to ascertain the effectiveness of current corporate governance practices from a Registrar's perspective. They obtained the information by forwarding questionnaires to the Registrars of all the higher education institutions at that time. The findings of both the quantitative and qualitative elements of the study indicated that the participating Registrars supported very high levels of compliance with

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[183] DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 40.

[184] Muller M "Key Functions and Attributes of a University Registrar" training manual (HESA June 2015) 9. Prof Marie Muller was the former Registrar of the University of Johannesburg and have granted the researcher exclusive access to her training manual and documents.

[185] See Chapter 6, para 6.3.2 below for this recommendation.

the *King Report on Corporate Governance in South Africa (King III)* and fully supported the reporting responsibility of their higher education institutions. However, the Registrars perceived the actual compliance of their higher education institutions to the *King III* principles and their adherence to the reporting mentioned above responsibilities to be at a much lower level.[186] According to Barac and Marx, the role of the Registrar has evolved over the years into a vital role regarding academic innovation and corporate governance. The Registrar fulfils a vital role in the Council concerning secretarial functions, administrative functions as well as management functions.[187] Furthermore, the Registrar's role has evolved into a role similar to that of a company secretary, as defined in the Companies Act of 2008.[188] *King IV* requires a company secretary to function as an important corporate governance mechanism.[189] The duties of a company secretary, as listed in section 88(2) of the Companies Act of 2008, are as follows: providing the board of a company collectively and individually with guidance as to their duties, responsibilities and powers; making the board aware of any law relevant to or affecting the company; reporting to the company's board any failure on the part of the company or a board member to comply with the Memorandum of Incorporation or rules of the company or the Companies Act of 2008; ensuring that minutes of all shareholders' meetings, board meetings and the meetings of any committees of the board or the company's audit committee are correctly recorded in accordance with the Companies Act of 2008; and certifying in the company's annual financial statements whether the company has filed required returns and notices in terms of the Companies Act of 2008.

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[186] Barac K and Marx B "Corporate Governance Effectiveness and Value added at South African Higher Education Institutions: A Registrar's View" October 2012 *JEF* 369.

[187] Barac and Marx October 2012 *JEF* 357.

[188] Barac and Marx October 2012 *JEF* 352.

[189] Barac and Marx October 2012 *JEF* 357. See Principle 10, *King IV*.

(x) Deans and Executive Directors

The functions of Executive Deans and Executive Directors, who form part of management, are prescribed by the Council.[190] They are also appointed by the Council.

(xi) Universities office of the ombud

Various public universities have an office of the ombud. This office is established as an independent and impartial office that works independently from the formal structures of the university. It assists in resolving disputes, conflicts and grievances. Currently, it is not mandatory for all universities to have these offices, but the DHET has encouraged all universities to establish an office of the ombud.[191] There is no Ombudsman Act in respect of higher education as the case is in Ontario, Canada where the Ombudsman's Act of 1990[192] was amended during 2014 to provide the provincial ombudsman with jurisdiction over universities.[193] This provincial ombud has the power to investigate any complaints relating to universities.[194] In the opinion of the author, the ombud at public universities does not contribute to improving governance and compliance at universities. They are more focused on transformation and resolution of disputes that cannot be resolved by the institution itself.

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[190] For more on Executive Deans and Executive Directors, see in general Seale O and Cross M "Executivism and Deanship in Selected South African Universities" 2017 (44) *Oxford Review of Education* 275 – 290.

[191] Makamandela-Mguqulwa Z "Every Varsity should have an Ombud" 2015-10-16 *Mail & Guardian*).

[192] R.S.O 1990, Chapter O.6.

[193] Section 1 of the Ombudman's Act of 1990.

[194] Section 14 of the Ombudman's Act of 1990; see also Chapter 5, para 5.5.2(b) for a discussion on the provincial ombud in Ontario, Canada.

2.4 CONCLUSION

This chapter explores the regulation and transformation of higher education in the post-Apartheid era. With the attainment of democracy, it was clear that the higher education sector was in dire need of change. Since 1994, numerous changes were implemented and effected, leading to the establishment of a single, co-ordinated higher education system instead of the fragmented and uncoordinated system previously in place. This in itself resulted in improved governance in higher education institutions. New legislation was promulgated, and various policies were implemented to assist universities in their governance practices. The changes that were implemented after the end of the previous dispensation all promoted institutional autonomy to a certain degree. Complete and unfettered autonomy can never be granted to public higher education institutions and was never promised by the DHET, as the Minister remains accountable for higher education institutions. However, with the promulgation of the Higher Education and Training Laws Amendment Act of 2012, various stakeholders felt that the institutional autonomy that was promised was now under threat.[195] Subsequently, the Higher Education Amendment Act of 2016 was promulgated in an attempt to clarify some of these changes, indicating that higher education institutions should instead focus on conducting their affairs more transparently, curb mismanagement and implement better governance practices. The Minister will not unnecessarily intervene in the affairs of a public higher education institution, and ministerial interventions will only be used as a last resort. The Minister nonetheless has the mandate to account to Parliament.

This chapter also provides an overview of institutional governance structures such as the Council, Senate, IF and SRC as well as their roles and functions in the institutions. The roles and functions of the Vice-

[195] This refers to the amendments as reflected in the Higher Education and Training Laws Amendment Act 23 of 2012. It is more fully discussed in Chapter 3.4 below.

Chancellor/Rector, Deputy Vice-Chancellor/Deputy Vice-Rector, Registrar and Dean were also discussed. The role of the Registrar was specifically considered since this position is informally known as the governance and compliance officer of an institution.[196] Although the Higher Education Act of 1997 makes provision for the governance framework of a higher education institution, it is silent on the accountability of the Council and executive management. In this instance, much could be learnt from the Companies Act of 2008, which not only makes provision for the incorporation of standards of director's conduct but now also makes provision for the partial codification of director's duties and the personal liability of these directors in the event of mismanagement.[197] The strict compliance and governance practices in a private higher education institution indicate that the implementation of similar practices as well as compulsory ethics and compliance training for Council, executive management and other employees should be considered. It should be noted that private higher education institutions could be held accountable in terms of the Companies Act of 2008, which includes the personal liability of directors.[198] The Companies Act of 2008 is much more prescriptive with regards to accountability and transparency. Currently, there is no real deterrent contained in the Higher Education Act of 1997 to prevent mismanagement within these institutions. The various independent assessor reports bear witness to the mismanagement and lack of proper governance practices within various public higher education institutions.[199] However, there is little in place to ensure that the Council and executive management of a university will act in the best interests of that institution. Taking into account the various institutions that have been placed under administration

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[196] See Chapter 6, para 6.3.2 below for the recommendation of formally including the Registrar of a public university in the Higher Education Act of 1997.

[197] Sections 76 and 77 of the Companies Act of 2008; see Chapter 4, para 4.2.5, 4.2.6 and 4.2.8 below for a discussion on these sections.

[198] The liability of directors is described in Chapter 4, para 4.2.8 below.

[199] See Chapter 3. Para 3.3.2 below for the discussion on the various independent assessor reports.

and the lack of proper governance and mismanagement in these institutions reflected in the reports issued by the independent assessors, it can be considered a fact that higher education, and especially its governance principles, are in dire need of transformation. It is a recommendation below that the fiduciary duties of the Council, Senate and executive management need to be clarified within the Higher Education Act of 1997. The Higher Education Act of 1997 should include a partially codified standard of conduct for management, as well as impose appropriate sanctions for non-compliance. Simply dismissing a member of management for mismanagement or for making decisions that were not in the best interest of the university does not address the problem of accountability.[200]

[200] See Chapter 6, para 6.3 below for the recommendations pertaining to the Higher Education Act of 1997.

CHAPTER 3: GOVERNMENT INTERVENTION IN HIGHER EDUCATION

3.1 INTRODUCTION AND BACKGROUND

As mentioned above, the DHET is the government department tasked with overseeing higher education in South Africa.[1] However, the extent of the Minister's powers in respect of the affairs of a higher education institution needs to be considered. The preamble of the Higher Education Act of 1997[2] confirms that "…..higher education institutions should enjoy freedom and autonomy in their relationship with the State within the context of public accountability and the national need for advanced skills and scientific knowledge."[3] According to Waghid, the regulation of higher education institutions by the government implies that the state exercises power over institutions.[4] Furthermore, the state, which "regulates" assumes a position of authority, whereby higher education institutions are given orders and must abide by them.[5] According to Hall and Symes, there has been a trend in university governance in South Africa, revealing an increase in state control. This has been expressed through legislation, primarily through the various amendments of the Higher Education Act of 1997. An understanding of the accountability of government for the use of any public funding is required. Hall and Symes explain that:

> ……what is currently missing in the discourse of governance is a conceptual device that acknowledges the legitimate role of the state in steering the public higher education system, while also recognising the rights of individual institutions to autonomous governance over

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[1] See Chapter 2, para 2.3.1 above for a discussion of the DHET.

[2] The Higher Education Act of 1997 is discussed in detail in Chapter 2, para 2.2.3 above.

[3] See para 3.2 below for a discussion of public accountability, institutional autonomy and co-operative governance.

[4] Waghid Y *et al.* "In Defense of Institutional Autonomy and Academic Freedom: Contesting State Regulation of Higher Education" 2005 *SAJHE* (19) 1178.

[5] Waghid Y *et al.* 2005 *SAJHE* (19) 1177 – 1178.

> their central business of research, teaching and learning.[6]

The regulation of South African higher education redresses both the inequalities and the institutional racial differentiations of the pre-1994 era, while at the same time developing the overall capacities of universities.[7] The author endorses these objectives.

This chapter also discusses the concepts of institutional autonomy, public accountability, co-operative governance and conditional autonomy and how they relate to one another.[8] An overview of universities that were placed under administration between 2008 and 2012 is provided below, providing details of three of these institutions.[9] This chapter also discusses ministerial interventions as prescribed by the Higher Education and Training Amendment Act of 2012 and the Higher Education Amendment Act of 2016 and the threat to institutional autonomy caused by these amendments.[10] The latter discussion concentrates on amendments improving governance,[11] amendments relating to ministerial interventions,[12] as well as interventions affecting private higher education institutions.[13]

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[6] Hall M and Symes A "South African Higher Education in the First Decade of Democracy: From Co-operative Governance to Conditional Autonomy" 2005 30(2) *Studies in Higher Education* 199 – 212. For more on state control and regulation in general, see Mbali C "Performance Management in Higher Education" 2006(13) *Alternation* 168 – 172.

[7] King R "Analysing the Higher Education Regulatory State" 2006 *Economic & Social Research Council* (Discussion paper no. 38) 7.

[8] See para 3.2 below for a discussion of these concepts. Another concept that is closely linked to institutional autonomy is academic freedom. According to Hall, the classic form of "academic freedom" is the institutional form of a human right. See Hall 2008 (20) *SAJHE* 8. Academic freedom will not be discussed further as it does not relate to this research topic.

[9] See para 3.3.2(b) below for the discussion on these universities.

[10] These acts are discussed more fully in para 3.4 below.

[11] See para 3.4.2 below for a discussion on these amendments.

[12] See para 3.4.3 below for a discussion on these amendments.

[13] See para 3.4.4 below for a discussion on these amendments.

3.2 INSTITUTIONAL AUTONOMY, PUBLIC ACCOUNTABILITY, CO-OPERATIVE GOVERNANCE AND CONDITIONAL AUTONOMY

3.2.1 Institutional autonomy and public accountability

Before discussing the various amendments to the Higher Education Act of 1997, it is crucial to understand the concepts of "institutional autonomy",[14] "public accountability",[15] "co-operative governance"[16] and "conditional autonomy,"[17] and how these relate to one another.[18] At system level, the governance of higher education institutions is a balance between institutional autonomy and public accountability, which is typically referred

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[14] The Oxford Dictionary defines "autonomy" as follows: "Freedom from external control or influence; independence." See Waghid Y *et al.* 2005 *SAJHE* 1177 – 1195; Kori E "Challenges to Academic Freedom and Institutional Autonomy in South African Universities" 2016 (vi) *IJTE* 45 – 52; Du Toit A "From Autonomy to Accountability: Academic Freedom under Threat in South Africa?" 2000 (26) *Social Dynamics* 84 – 89 for more on institutional autonomy and its history in South African universities. For a full discussion on institutional autonomy, see Van Pletzen JH *The Implications of Current Legislative Changes for Academic Freedom and Institutional Autonomy of South African Higher Education Institutions* (Published MA thesis University of Free State 2015).

[15] The obligations of agencies and public enterprises who have been trusted with public resources, to be answerable to the fiscal and the social responsibilities that have been assigned to them. These companies and agencies need to be accountable to the public at large and carry out the duties assigned to them responsibly. Also see Ljeoma EOC and Sambumbu AM "A Framework for Improving Public Accountability in South Africa" 2013 (48) *JPA* 282 – 298 for more on public accountability and its benefits. See Munzhedzi PH "Fostering Public Accountability in South Africa: A reflection on challenges and successes" 2016 (12) *Journal of Transdisciplinary Research in Southern Africa* 1 – 7.

[16] According to the NCHE, co-operative governance entails autonomous civil society constituencies working co-operatively with an assertive government. See para 1.4.2 of the *NCHE Report* 16.

[17] Conditional autonomy is the combination of procedural and substantive autonomy as independent variables. See Hall M and Symes A "Co-operative Governance or Conditional Autonomy? Principles for Governance of South African Higher Education" 2003 *CHE Kagisano* 21; this concept will be discussed in para 3.2(c) below.

[18] This thesis does not deal with institutional autonomy, public accountability and co-operative governance in detail, as these are topics each worthy of their own research. These concepts are explained as they bear relevance to governance in higher education.

to as co-operative governance.[19] The *1997 White Paper*[20] describes institutional autonomy as follows:

> The principle of institutional autonomy refers to a high degree of self-regulation and administrative independence with respect to student admissions, curriculum, methods of teaching and assessment, research, establishment of academic regulations and the internal management of resources generated from private and public sources. Such autonomy is a condition of effective self-government... institutional autonomy is therefore directly inextricably linked to the demands of public accountability.[21]

The *1997 White Paper* then explains public accountability as follows:

> The principle of public accountability implies that institutions are answerable for their actions and decisions not only to their own governing bodies and the institutional community but also to the broader society. Firstly, it requires that institutions receiving funds should be able to report how, and how well, money has been spent. Secondly, it requires that institutions should demonstrate the results they achieve with the resources at their disposal. Thirdly, it requires that institutions should demonstrate how they have met national policy goals and priorities[22]

In its simplest form, accountability can be described as the requirement to give an account of how a responsibility that has been delegated to an institution or person has been carried out.[23] Accountability and oversight are constitutional requirements in all the spheres of government in South Africa, and their foundation is embedded in the Constitution.[24] It could be

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[19] Bergen E *et al.* (eds) *Leadership and Governance in Higher Education: Handbook for Decision-makers and Administrators* (Raade Academic 2013) 98.

[20] See Chapter 2, para 2.2.2 for a discussion on the *1997 White Paper*. The *1997 White Paper is* used to discuss the principle of institutional autonomy in this instance as the Higher Education Act of 1997 only makes mention of the principle in its preamble. The *1997 White Paper* can therefore serve as authority for the discussion of the principle of institutional autonomy.

[21] Para 1.24 of the *1997 White Paper* 13.

[22] *1997 White Paper* 13.

[23] Witthoft G "Accountability and good governance in the public sector" 2003 *Auditing SA* 13.

[24] See Chapter 3 of the Constitution; Munzhedzi 2016 *Journal of Transdisciplinary Research in Southern Africa* 1; Malan L "Intergovernmental Relations and Co-operative

argued that in the context of governance, public accountability is relatively under-explored compared to academic freedom and institutional autonomy.[25] In other contexts, public accountability has been well explored; for instance, in the local government sphere.[26]

In 2005 the CHE[27] established a task team to undertake an independent assessment of higher education institutions, and specifically, to investigate government involvement in higher education.[28] Prior to this investigation, the Higher Education Act of 1997 had been amended several times.[29] The CHE argued that these amendments arose in response to governance crises and mismanagement of universities.[30] The amendments occurred almost on an annual basis, and most of them related to issues of

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government in South Africa: The Ten-Year Review" 2005 (24) *Politeia* 226 – 243; Edwards T "Co-operative Governance in South Africa, with Specific Reference to the Challenges of Intergovernmental Relations" 2008 (27) *Politeia* 65 – 85.

[25] The *CHE Report* on the independent task team on higher education, institutional autonomy and academic freedom "Academic Freedom, Institutional Autonomy and Public Accountability in South African Higher Education (2008), hereinafter referred to as the *CHE HEIAAF Report* 40. See also Kearns KP "Institutional Accountability in Higher Education: A Strategic Approach" 1998 (22) *Public Productivity & Management Review* 143 – 155 for a discussion of institutional accountability.

[26] Sikhakane BH and Reddy PS "Public Accountability at the Local Government Sphere" 2011 (4) *African Journal of Public Affairs* 85 – 99; Kearns KP 1998 (22) *Public Productivity & Management* 143.

[27] See meeting report of the Education Portfolio Committee "Institutional Autonomy and Academic Freedom: Briefing by Council for Higher Education" (meeting date: 22 May 2006) https://pmg.org.za/committee-meeting/6902/ (Date of use: 3 September 2018).

[28] See Singh M and Lange L (eds) "Submission by the Higher Education Quality Committee to the CHE HEIAAF Task Team" 2007 25(3) *Perspectives in Education* 1 – 10 and the executive summary of the *HEIAAF Report*. See also Du Toit A "Losing the Academic Freedom Plot? The CHE and the Debate on Institutional Autonomy and Public Accountability" 2013 (8) *Kagisano* 28 – 54.

[29] See Chapter 2, para 2.2.3 above for a discussion of the Higher Education Act of 1997 and its amendments; Kori 2016 *IJTE* 50 – 51.

[30] The 1999 amendments, for instance, allowed the Minister to appoint an administrator for a distressed institution for a period of six months. The 2001 amendments allowed the Minister to appoint an administrator to take over the authority of the Council or management of an institution for a period not exceeding two years. This is where the concern regarding the threat to institutional autonomy originated. See Kori E 2016 *IJTE* 50.

governance and financial crises that had arisen in various institutions.[31] The CHE investigation was undertaken against a background of concerns and claims of a threat against institutional autonomy, academic freedom and increased government intervention into the affairs of higher education institutions. An assessment of the nature of government regulation, institutional autonomy and public accountability was therefore explicitly included in the mandate of the task team.[32] The task team was required to deliver a report on the nature of the involvement of government in higher education and on whether or not there was more interference by the government than was healthy for the progression and transformation of higher education in South Africa.[33] The task team realised that there was no universal understanding of institutional autonomy.[34] They identified various forms of accountability, namely, collegial or professional accountability,[35]

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[31] The *CHE HEIAAF Report* 1.

[32] The CHE *HEIAAF Report* vii – xi; 1 – 3. The HEIAAF delivered its report to the CHE in August 2008. Its objectives were to critically analyse the nature and modes of government and other regulatory bodies' involvement in higher education and its transformation and development; identify and critically assess the conceptions of academic freedom, institutional autonomy and public accountability held by key higher education actors; and produce for the consideration of the CHE a report on the nature of the involvement of government and regulatory bodies in higher education on various conceptions of academic freedom, institutional autonomy and public accountability as well as their efficacy, especially with respect to higher education transformation and development.

[33]The *CHE HEIAAF Report* 69. The task team began its enquiry in July 2005 when the members agreed on their terms of reference. Six mechanisms for the purpose of gathering information and conducting their research were adopted which included the following: an overview of the then recent and current debates in South African higher education surrounding academic freedom, institutional autonomy and public accountability, which was completed during October 2005; in July 2005 the HEIAAF invited various stakeholders to submit submissions within the scope of the HEIAAF enquiry; the process of commissioning research began in November 2005 and subsequently five independent research projects relating to the identified issues commenced in March 2006; the HEIAAF met with various individuals who could contribute their relevant knowledge and expertise to reaching the objectives and aims of the HEIAAF; the HEIAAF engaged institutional and other stakeholders in debates in various regions during March – June 2006; and the HEIAAF convened a seminar in April 2007 to reflect on their research outcomes. See *CHE HEIAAF Report* 5-6.

[34] The *CHE HEIAAF Report* 35. For a full discussion of alternative concepts of institutional autonomy, see the *CHE HEIAAF Report* 35 – 38.

[35] This refers specifically to academic and institutional autonomy. For instance, peer review is one way of academics holding one another to intellectual account. Further to this, scientists and scholars of an institution are accountable for the administration in

functional and hierarchical accountability[36] and political and public accountability[37] and financial and fiduciary accountability.[38] According to the task team, the various university Councils might interpret financial and fiduciary accountability differently, and their interpretation would depend on whether they view institutional autonomy to be substantive or functional. Functional autonomy refers to where an institution can function on its own without any external interference.[39] Substantive autonomy, on the other hand, considers the rights of academic self-government in accordance with academic values to be central to institutional autonomy, all the while recognising rights, duties and obligations.[40] A functional approach might lead to a complete breakdown of accountability (professional, functional, public and financial), and it might lead to a gross failure of institutions and the way in which they are managed.[41]

The *1997 White Paper* and the Higher Education Act of 1997 indicate that South African higher education is subject to a system of state supervision. In these systems, public higher education institutions are guided and informed by policies, which aim to ensure academic quality and public

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connection to professional conduct and agreed administrative procedures. See the *CHE HEIAAF Report* 41; Du Toit A "Autonomy as a Social Compact" 2007 *CHE* 96 – 99.

[36] This refers to the context of bureaucracy and management. Functional autonomy refers to when an institution is able to function independently without undue interference from external parties. See the *CHE HEIAAF Report* 36. In the instance of hierarchical autonomy, competencies and duties are structured so that each official is answerable to the next level of superiority. See the *CHE HEIAAF Report* 42.

[37] This refers to the context of democratic politics. Representatives are responsible for carrying out the mandate that they were given when elected. In a governance context, the complexity of this type of autonomy become clears in the duties of Council members (especially external Council members), who act more as lay governors, their decisions in the institutional and public interest. See the *CHE HEIAAF Report* 42.

[38] This pertains to the context of enterprise and public monies. In this instance, reference is made to sound financial expenditure, which is due to stakeholders and the public in general. See the *CHE HEIAAF Report* 42.

[39] The *CHE HEIAAF Report* 36.

[40] The *CHE HEIAAF Report* 35 – 36.

[41] The *CHE HEIAAF Report* 42.

accountability and are partially funded by the government. Such institutions are granted institutional autonomy with oversight responsibility vested in their Councils.[42] The *1997 White Paper*[43] is prescriptive about delineating the Minister's powers as well as his/her duties and obligations. The *CHE HEIAFF Report* is also very clear that ministerial interventions should be considered as a last resort.[44] The Minister of Higher Education and Training has a responsibility to Parliament with regards to the proper exercise of his/her duties and functions.[45] During her budget presentation in 2007, the Minister of Education[46] emphasised the following:

> It has been distressing to note and act on serious if not criminal governance and fiduciary lapses at some of our institutions… some of our institutional leaders have treated public finances as their personal accounts. Others have failed to give institutional leadership. HESA[47] must act speedily to address these lapses and avoid state intrusion in academic affairs… The financial lapses have convinced me that stronger objective oversight mechanisms must be established to protect public finances and the reputation of honest hard-working Vice-Chancellors and academics.[48]

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[42] The *CHE HEIAAF Report* 20. The state supervision system differs from state control system. In the latter, the state exercises direct control over higher education institutions. See also King 2006 *Economic & Social Research Council* 7 – 9.

[43] See paras 3.5, 3.6 and 3.7 of the *1997 White Paper*.

[44] The *CHE HEIAFF Report* 21.

[45] In terms of s 91 of the Constitution of the Republic of South Africa Act of 1996, the Cabinet consists of the President, Deputy President and Minister. The President appoints the Deputy President and Ministers and assigns them their powers and functions; the President may also dismiss them. Section 92 of the Constitution provides that the Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President. The Members of Cabinet are accountable collectively to Parliament to exercise their powers and perform their functions. Failure of the latter could lead to the removal of a Minister by the President.

[46] Ms Naledi Pandor, who was the Minister of Education prior to Basic Education and Higher Education being divided into two separate departments.

[47] HESA became Universities South Africa (USAf) on 22 July 2015. See Chapter 2 para 2.3.1 above for a discussion on USAf.

[48] Speech by Ms Naledi Pandor, tabling departmental budget vote for the 2007/2008 financial year 29 May 2007 7, see http://www.amesa.org.za/Pandor.pdf (Date of use: 17 October 2017).

It is clear from this warning that not only has public accountability been problematic within some institutions for many years, but that the DHET will intervene in failing institutions where abuse of public funds and mismanagement of institutions are found to have occurred. The Minister provided a clear indication that where institutions practise academic freedom and institutional autonomy which does not result in accountable actions, the government is of the view that there is a need for sectorial self-regulation, external regulation or "objective oversight", or a combination of the latter concepts to restore the balance between institutional autonomy and accountability.[49] It might thus be argued that these reasons prompted the promulgation of the Higher Education Training and Amendment Act of 2012 and subsequently, the Higher Education Amendment Act of 2016.[50]

The task team specifically recommended that a mechanism to promote accountability of Councils be identified. The ultimate goal was to achieve this without increased government interference. There was also a need for the induction of Council members, for the clarification of the roles and responsibilities of Council members and for an annual evaluation of the efficiency of Council.[51] University Councils,[52] Senates[53] and Institutional

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[49] The *CHE HEIAAF Report* 42.

[50] These two Acts are discussed more fully in para 3.4 below.

[51] The *CHE HEIAAF Report* 45; Higher Education South Africa (HESA) "The Challenge of Renewal and Engagement: Public Higher Education in South Africa" 2007 (Unpublished draft report submitted to the Presidential Working Group on Higher Education meeting held in Pretoria on 8 May 2007) 34 – 35; Friedman S and Edigheji O "Eternal (and Internal) Tensions? Conceptualising Public Accountability in South African Higher Education" 2008 *CHE* 34 – 38.

[52] Building the fiduciary capacity of Councils has been a perennial theme of South African higher education governance. The HEIAAF task team reiterated the need for a more inclusive constituency representation on Councils to enhance accountability without increasing government control, better induction of Council members to clarify the roles and responsibilities of members as well as the annual self-evaluation of Councils. See the *HEIAFF Report* 45. For a discussion on university Councils, see Chapter 2, para 2.3.2(b)(.1).

[53] For a discussion on Senates, see Chapter 2, para 2.3.2(b.2).

Forums[54] have essential roles to play in contributing to institutional autonomy.[55] Co-operative governance is given expression through the interrelationship between these bodies. Their functions underpin the principles of autonomy and accountability.[56] The HEIAAF task team conceded that there was no universal understanding or practice of institutional autonomy. The task team considered various forms[57] of institutional autonomy, including absolute autonomy,[58] the "TB paradigm",[59] substantive autonomy,[60] functional autonomy[61] and instrumental autonomy.[62] According to the task team, substantive autonomy is the most valid form of institutional autonomy for public higher education institutions. Institutional autonomy endorses the following: it is an idea which promotes both the

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[54] For a discussion on the Institutional Forum, see Chapter 2, para 2.3.2(b.3).

[55] See Chapter 2 para 2.3 for a discussion of these institutional structures.

[56] The *CHE HEIAAF Report* 20 – 22.

[57] The *CHE HEIAAF Report* 38 – 40.

[58] This is where universities are completely free of any external influence. According to the *CHE HEIAAF* task team, this type of autonomy would be impossible to achieve in practice and it was not considered further. See generally, Hexmoore H "A Model of Absolute Autonomy and Power: Toward Group Effects: 2002 (14) *Connection Science* 323 – 333.

[59] This is central to institutional autonomy: giving the right of academic self-government in accordance with academic values and seeing it as coterminous with freedom from external interference. See generally, Friedmanand Edigheji 2006 *CHE* 4 – 5, Hall 2006 (20) *SAJHE* 8 – 12.

[60] This type of autonomy also takes the right of academic self-government in accordance with academic values to be central to institutional autonomy. However, it explicitly acknowledges coexisting rights, duties and obligations. See Van Pletzen *Implications of Current legislative Changes for Academic Freedom, Institutional Autonomy of South African Higher Education Institutions* 38 – 39.

[61] According to the task team, "what matters is whether the university, taken as an institutional whole, is able to function independently without undue interference by external parties or forces. Functionally, it is irrelevant whether the university, in its internal governance structures, maintains academic freedom in the sense of scholarly freedom and academic rule, or not." In other words, a university might well have functional institutional autonomy while internally dismantling academic rule and restricting scholarly freedom in various ways.

[62] This type of autonomy renders institutional autonomy redundant as well as rendering the freedom of academics and students in the institution potentially void, because the university's purpose and governance become aligned with the political goals of government. See the *CHE HEEIF Report* 36.

public good and forms part of the values of the academy, and is accepted as an integral part of the higher education's social role and accountability; it views the practice of institutional autonomy by institutions to be linked to a defence mechanism by institutions of academic freedom as exercised by the various stakeholders and connected to the essential goals of the society; there is recognition that threats to academic freedom may originate from inside as well as outside of the institutions; it provides a viable platform for the building of trust among society, the state and the higher education sector; and it recognises that there are mutual rights, duties and accountabilities on the part of the academy, institutional leadership, government and society to ensure that there is proper governance in the best interests of the public.[63]

The task team made various conclusions and recommendations in the *HEIAAF Report* which include the following: substantial autonomy, which is integral to higher education's social role and accountability, should be promoted in the South African context of institutional autonomy; improvements should be made in the steering of higher education and good governance on all levels;[64] government should review its strategies for giving effect to its democratic accountability in higher education, and accountable governance practices must be promoted at both sectoral and institutional levels.[65]

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[63] The *CHE HEIAAF Report* 38; and in general, Dressel PL (ed) "The Nature and Components of Autonomy" 1980(26) *New Directions for Institutional Research* 5 – 9.

[64] These levels include system, sectorial, institutional and academic.

[65] "Democratic accountability" includes the following: the constitutional obligation of government to both promote and uphold academic freedom; the provision of resources by government to institutions to enable them to fulfil their obligations in meeting their public goals; government must be able to explain its decisions and actions to higher education stakeholders; and have the capacity to ensure that there is accountability by institutions. For a summary on the conclusions and recommendations of the report, see the *CHE HEIAAF Report* 71 – 76. This thesis provides only a summary of the conclusions and recommendations pertaining to accountability and institutional autonomy.

3.2.2 Co-operative governance and conditional autonomy

Intergovernmental relationships[66] are intended to promote and facilitate co-operative governance and decision-making by ensuring that policies and activities across all spheres encourage service delivery to meet the needs of the public.[67] Intergovernmental relationships refer to the three spheres of government as provided for in the Constitution.[68] In terms of the *1997 White Paper*, co-operative governance assumes a proactive, guiding and constructive role for government as well as a co-operative relationship between the state and higher education institutions.[69] One implication of this is, for example, that institutional autonomy is to be exercised in tandem with public accountability; another is that the DHET's oversight role does not involve responsibility for the micro-management of institutions.[70] Lastly, the DHET will undertake its role in a transparent manner.[71] It has been established by the South African courts that public higher education institutions are organs of state.[72] The values and principles of public

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[66] For more on intergovernmental relations, see Mathebula FML "South African Intergovernmental Relations: A Definitional Perspective" 2011 (46) *JPA* 834 – 851.

[67] Edwards 2008 *Politeia* 66; Mofolo MA "Intergovernmental Relations System for Public Participation in the Local Sphere of Government" 2016 *JPA* 230 – 243; Reddy PS "Intergovernmental Relations in South Africa" 2001 (20) *Politeia* 21 – 37.

[68] The three spheres of government are national, provincial and local. DHET forms part of the national sphere of government. See s 41 of the 1996 Constitution; and in general, see Edwards 2008 *Politeia* 65; Malan 2005 *Politeia* 228 – 241; Mdliva ME *Co-operative Governance and Intergovernmental Relations in South Africa: A Case Study of the Eastern Cape* (Published Master's thesis University of KwaZulu Natal 2012) 22 – 23.

[69]Zulu TSS *Co-operative Governance in South Africa: A Case Study of Intergovernmental Relations in the Provision of Housing* (Published Master's thesis University of KwaZulu Natal 2014) 19 – 30; Edwards 2008 *Politeia* 66 – 83 for a general discussion of cooperative governance in South Africa; DHET "Guidelines for Good Governance Practice and Governance Indicators for Councils of South African Public Higher Education institutions" December 2017 20 – 23.

[70] Para 3.33 of the *1997 White Paper*; Du Toit A 2015 *HESA* VI.

[71] *1997 White Paper* 3.7.

[72] *Nutesa v Central University of Technology* (2008) ZALC 146; (2009) 4 BLLR 369 (L.C.); (2009) 30 ILL 1620 (LC); *Baloro v University of Bophuthatswana* 1995 4 SA 197 (B),

administration therefore also apply to higher education institutions as organs of state. According to the *NCHE Report*, these principles include responsiveness to public needs and encourage the public to participate in policymaking, accountability and transparency, fostered by providing the public with accurate information.[73] Considering this, Du Toit emphasises that although higher education institutions are public universities and thus can be interpreted as organs of state, they are not an arm of government and have always maintained a degree of institutional autonomy.[74]

The *1997 White Paper* confirmed that the Department of Education must adopt a model of co-operative governance for higher education in South Africa based on the principle of autonomous institutions working co-operatively with a proactive government and in a range of partnerships.[75] Higher education institutions are granted institutional autonomy[76] with oversight responsibility vested in a Council[77] established by the Higher Education Act of 1997.[78] According to the *1997 White Paper* as well as the

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[73] The *NCHE Report* 194. For more on governance and transparency in general, see Mofolo 2016 *JPA* 230 – 243; Cloete F and Auriacombe CJ "Governance and Transparency in South Africa" 2007 (26) *Politeia* 193 – 199.

[74] Du Toit 2014 *HESA* 50.

[75] Para 3.6 and 3.7 of the *1997 White Paper*. For more on co-operative governance see in general du Toit A "Autonomy as a Social Compact" 2007 *CHE* 111 – 120; Crous C Corporate *Governance in South African Higher Education Institutions* (Unpublished PhD thesis University of the Free State 2017) 124. Co-operative governance assumes a proactive, guiding and constructive role for government. It also assumes a co-operative relationship between the state and higher education institutions. One implication of this is, for example, that institutional autonomy is to be exercised in tandem with public accountability. Another is that the DHET's oversight role does not involve responsibility for the micro-management of institutions. See para 3.33 of the *1997 White Paper*. A third implication is that the DHET will undertake its role in a transparent manner. See also the *NCHE Report* 171 – 180 for comments on co-operative governance prior to the Higher Education Act of 1997.

[76] For a discussion of institutional autonomy prior to South Africa attaining democracy, see Du Toit 2007 *CHE* 101 – 104.

[77] See Chapter 2, para 2.2.2 above.

[78] The CHE *HEIAAF Report* 20.

Constitution,[79] a Minister has a duty to provide leadership, and must ultimately take responsibility for all his/her actions and decisions.[80]

A state-supervised higher education system is usually categorised by its framework policies aimed at ensuring academic quality and public accountability. Resources are provided by the government to enable the institution to fulfil its obligations towards the public.[81] These state-supervised higher education institutions are granted institutional autonomy, with oversight responsibility vested in a Council. State-supervised institutions differ from state-controlled institutions as the state exercises direct control of the institutions.[82]

The *NCHE Report* discusses three types of models to be considered pertaining to the relationship between government and higher education institutions to be considered.[83] The first of these is the state control model where all key aspects of the institution are controlled exclusively by the government.[84] This system is one that has operated in Europe over the last

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[79] Section 92 of the Constitution.

[80] *1997 White Paper,* clause 3.5.

[81] The *CHE HEIAAF Report* 20.

[82] The *CHE HEIAAF Report* 20. For information about state control and state supervision in general, see Kohler J and Huber J (eds) *Higher Education Governance between Democratic Culture, Academic Aspirations and Market Forces* (Council for Publishing Europe 2006) 85 – 88.

[83] Cloete N *et al. Challenges of Co-operative Governance* (CHET South Africa 2003) 39; Cloete *et al.* (eds) *Transformation in Higher Education: Global Pressures and Local Realities* 54; DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 12.

[84] Moja T, Muller J and Cloete N "Towards New Forms of Regulation in Higher Education: The Case of South Africa" 1996 (32) *Higher Education* 144 – 147; HEIAAF Task Team "Overview of Recent and Current Debates in South African Higher Education: Academic Freedom, Institutional Autonomy and Public Accountability" 2005 *CHE* 6; Van Pletzen *Implications of Current Legislative Changes for Academic Freedom, Institutional Autonomy of South African Higher Education Institutions* 33 – 34.

decades.[85] France is an example where a system of state control is still practised.[86]

The second model is one of state supervision where the government provides the framework within which the institutions operate and dictates how they should produce the output capacity. In this model, the government uses "regulation by directives" and "regulation by incentives".[87] This model has been popular in countries such as the United States of America (USA), Canada, Australia and the United Kingdom.[88]

The third model pertains to state interference and is not based on a systematic control or intervention policy. The government intervenes once a higher education institution no longer conforms to the government's development path. This was the model practised during the pre-1994 era in South Africa.[89]

The NCHE proposed a model of co-operative governance.[90] The Department of Education opted for this model because it recognised the

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[85] The *NCHE Report* 174 – 175; Sayed Y "The Governance of the South African Higher Education System: Balancing State Control and State Supervision in Co-operative Governance?" 2000 (202) *IJED* 477; Neave G and Van Vught F (eds) *Government and Higher Education Relationships Across Three continents: The Winds of Change* (IAU Press United Kingdom 1994) 9 – 11.

[86] Teixeira P *et al.* (eds) *Markets in Higher Education: Rhetoric or Reality?* (Kluwer Academics Dordrecht 2004) 311.

[87] Hall, Symes and Luescher "Governance in South Africa Higher Education" 2002 *CHE* 31; Van Pletzen *Implications of Current Legislative Changes for Academic Freedom, Institutional Autonomy of South African Higher Education Institutions* 34 – 36.

[88] The *NCHE Report* 175; see Chapter 5 below for a discussion of the models used in the USA and Canada; Sayed Y 2000 (202) *IJED* 477 – 478; Neave, Van Vught (eds) *Government and Higher Education Relationships Across Three Continents: The Winds of Change* 3 – 5; 9 – 14; Moja , Muller and Cloete 1996 (32) *Higher Education* 147 – 148; Van Pletzen *Implications of Current Legislative Changes for Academic Freedom, Institutional Autonomy of South African Higher Education Institutions* 36 – 38.

[89]The *NCHE Report* 175.

[90] Coetzee T "Co-operative Governance and Good Governance: Reality or Myth?" 2010 (35) *Journal of Contemporary History* 86 – 90; Cloete *et al. Challenges of Co-operative Governance* 4; DHET "Guidelines for good governance practice and

need to transcend the adversarial relations between the state and society. This model of co-operative governance is "based on the principle of autonomous institutions working co-operatively with a proactive government and in a range of partnerships."[91] According to Hall and Symes, the NCHE conceptualised co-operative governance as a version of the "state supervision" model.[92]

The *1997 White Paper* confirms "…that co-operative governance assumes a pro-active, guiding and constructive role for government."[93] It is clear from the *1997 White Paper* that there needs to be a co-operative relationship between higher education institutions and the state, and that institutional autonomy needs to be exercised in conjunction with public accountability.[94] The National Commission emphasised that both academic freedom and institutional autonomy were vital for a well-functioning higher education institution in the post-1994 era.[95] Co-operative governance depends on three key assumptions: differentiation and sharing of functions and powers; policy formation, decision-making, implementation and monitoring are separate, yet connected functions; and multiple levels and facets of policy-making, decision-making, implementation and monitoring.[96] The Higher Education Act of 1997 does not grant unfettered autonomy or independence. In fact, it clearly states that autonomy must be linked to

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governance indicators for Councils of South African public higher education institutions" December 2017 12 – 14.

[91] *1997 White Paper,* clause 3.6; Cloete *et al. Challenges of Co-operative Governance* 5; HEIAAF Task Team 2005 *CHE* 6.

[92]Hall M and Symes A "South African Higher Education in the First Decade of Democracy: from Co-operative Governance to Conditional Autonomy" 2005 (30) *Studies in Higher Education* 202.

[93] *1997 White Paper,* para 3.7.

[94] *1997 White Paper,* para 3.7.

[95] The *NCHE Report* 73.

[96] The *NCHE Report* 180.

accountability.[97] It is clear from the above information that although higher education institutions have a certain degree of institutional autonomy and remain responsible for their day-to-day management, the DHET remains responsible and accountable to Parliament for higher education on a national level.

The *NCHE Report* analyses co-operative governance in detail.[98] According to the NCHE, co-operative governance has certain implications: firstly, there is a relationship between the state and higher education institutions. It was the NCHE's objective to mediate the opposition between state intervention and institutional autonomy. It states, "....the directive role of the state is reconceived as a steering and co-ordinating role. Institutional autonomy is to be exercised within the limits of accountability".[99] It is important that the state and higher education institutions work together and that they reconcile the concept of self-regulation with the concept of a central authority making decisions.[100] The second implication refers to the relations among higher education institutions and the organs of civil society. This implication indicates that higher education institutions should establish new partnerships and collaborations with commercial enterprises, parastatals, research bodies and non-governmental organisations. These local stakeholders will have an interest in participating in the governance of higher education institutions.[101] A third implication relates to the relationship both among higher education as well as relationships within institutions. Higher education institutions face an increased demand for recurrent, continuing and adult learning as well as more flexible modes of delivery. Institutions will, therefore, have to form collaborations with one another to

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[97] The *NPHE Report* 19.

[98] Hall, Symes and Luescher 2002 *CHE* 31.

[99] The *NCHE Report* 7 – 8. See Du Toit 2014 *HESA* 31.

[100] The *NCHE Report* 8.

[101] The *NCHE Report* 8.

alleviate some of the pressure of these increased demands.[102] The NCHE supported institutional autonomy in the higher education context but stated that the latter must be exercised "within the context of increased accountability implied by the principle and the system of co-operative governance".[103] It is clear from the information above that a model of co-operative governance can only be successfully implemented in the higher education environment if the state and higher education institutions work together. In line with the NCHE recommendations with regards to a model of co-operative governance, the government should assist higher education institutions by "steering" them rather than wanting to "control" them.

Both the *1997 White Paper* and the subsequent Higher Education Act of 1997 recognise co-operative governance. According to Hall and Symes, the DHET did not regard co-operative governance as a success, and this model "failed in the heart of political realities." Hall and Symes instead put forward a model of conditional autonomy. They propose that higher education institutions should retain substantive autonomy, but that the state should limit their procedural autonomy. They indicate that there has been an increase in state control noted in university governance.[104]

According to Hall and Symes, conditional autonomy "recognises the role of the state in the steering of the state in this system and its outcomes through procedural controls, while respecting the autonomy of individual institutions in the substantive fields of their intellectual work".[105] Waghid expresses that this is a viable option to consider, and agrees with Hall and Symes that conditional autonomy could potentially minimise state control or

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[102] The *NCHE Report* 8.

[103] The *NCHE Report* 196 – 197. See Du Toit 2014 *HESA* 31.

[104] Hall and Symes 2005 *Studies in Higher Education* 208. See also Van Pletzen *The Implications of Current Legislative Changes for Academic Freedom and Institutional Autonomy of South African Higher Education Institutions* 39.

[105] Hall and Symes 2005 *Studies in Higher Education* 208; Hall 2006 *SAJHE* 12.

interference in institutions.[106] The CHE also supports the notion of conditional autonomy.[107]

However, according to Divala, the concept of conditional autonomy is problematic. He theorises that the state will be unable to maintain its position in providing funding to universities for public good without imposing any conditions to this funding.[108] Public higher education institutions will always have to consider the public and its interests, which could lead to public higher education institutions functioning within a framework of public expectations, making the substantive autonomy unfeasible.[109] The HEQC also voiced its concern by stating that the distinction between substantive and procedural autonomy may be more theoretical than practical and that it would be advisable for this concept to be discussed and considered by various higher education stakeholders.[110]

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[106] Waghid Y "Academic freedom, institutional autonomy and responsible action: A response to Martin Hall" 2006 (20) *SAJHE* 19; Van Pletzen *The Implications of Current Legislative Changes for Academic Freedom and Institutional Autonomy of South African Higher Education Institutions* 39 – 40.

[107] Hall, Symes and Luescher 2002 *CHE* 97 – 98.

[108] Divala J "Conditional Autonomy and Responsible Action: A Response to Yusif Waghid and Martin Hall" 2006 (20) *SAJHE* 23.

[109] Divala 2006 SAJHE 23; Van Pletzen *The Implications of Current Legislative Changes for Academic Freedom and Institutional Autonomy of South African Higher Education Institutions* 40.

[110] See the HEQC submission to the CHE HEIAAF Task Team during 2007 http://www.che.ac.za/sites/default/files/publications/d000173_32_HEQC_7-May07_0.pdf (Date of use: 3 September 2018); Van Pletzen *The Implications of Current Legislative Changes for Academic Freedom and Institutional Autonomy of South African Higher Education Institutions* 40. See Chapter 2, para 2.3.1 above for a discussion on the HEQC.

3.3 MINISTERIAL INTERVENTION

3.3.1 Introduction

This section reviews the changes to the Higher Education Act of 1997 brought about by both the Higher Education and Training Laws Amendment Act of 2012 and the Higher Education Amendment Act of 2016. These amendments provided the Minister with greater power to intervene in the affairs of higher education institutions.[111] The Higher Education and Training Laws Amendment Act of 2012 was perceived to be too open-minded and not duly examined. Furthermore, stakeholders opined that the government wanted to deal with the various higher education concerns by implementing policies and amending the Higher Education Act of 1997.[112] Stakeholders also seem to believe that the Higher Education and Training Laws Amendment Act of 2012 was "pushed through," and that there was very little public participation to ensure that the voices of all higher education stakeholders were heard. Several universities were placed under administration between 2008 and 2012 due to poor governance practices.[113] Considering the above information, it is clear that there was a need for change in governance practices in higher education institutions. Subsequently, the Higher Education Amendment Act of 2016 was published, clarifying some of the 2012 amendments. The process followed by the DHET to recommend the amendments included personal invitations to higher education stakeholders to comment on the Bill. The process also allowed more time for stakeholders to comment on the Bill, and there was a longer consultation process than had been the case with the Higher Education and Training Amendment Act of 2012.

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[111] CHE *Higher Education Reviewed: Two Decades of Democracy* 2016 48.

[112] CHE *Higher Education Reviewed: Two Decades of Democracy* 2016 97; Du Toit A "Policy and Regulatory Changes in Higher Education: A Historical and Comparative Academic Freedom Perspective" (report) 2013 *HESA* 15 – 16.

[113] These institutions are discussed in more detail in para 3.3.2 below.

3.3.2 Failures in governance in South African universities

(a) Introduction

Governance in South African universities remains a challenge if one considers the number of institutions that have been placed under administration.[114] HESA's report discusses various serious problems that led to the governance failures at some public higher education institutions. Some of the governance issues mentioned include, for instance, factionalism in Councils, Council members' involvement in procurement processes to promote themselves, and non-adherence to meeting processes and procedures.[115] The HESA report provides a summary of the most common issues raised in assessors' reports, notably, governance failings related to the functioning of Councils, fraudulent relationships among the Councils and the Vice-Chancellors and staff of the institutions, ineffective institutional structures and management failures and challenges.[116] The report also discusses the lack of experience of Council members explicitly, stating that such members are particularly troublesome. These inexperienced members have become involved in the operational matters of the institutions and pursue their own agendas to advance themselves and not the institution. In some cases, new Council members were not provided with formal induction workshops to assist them in strengthening their knowledge and understanding of the institution.[117]

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[114] CHE *Higher Education Reviewed: Two Decades of Democracy* 49.

[115] HESA "Analysis of recent assessor reports of universities in SA" 2012 (Unpublished report prepared for the HESA workshop on 19 July 2012 and adopted by the HESA board on 17 October 2012) 5 – 6.

[116] HESA "Analysis of recent assessor reports of universities in SA" 2012 (Unpublished report prepared for the HESA workshop on 19 July 2012 and adopted by the HESA board on 17 October 2012) 1.

[117] HESA "Analysis of recent assessor reports of Universities in SA" 2012 (Unpublished report prepared for the HESA workshop on 19 July 2012 and adopted by the HESA board on 17 October 2012); DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 24.

The various independent assessor reports list unacceptable conduct by certain Council members, which is of particular concern. Examples of such behaviour include, among other things, interference with procurement processes to advance their own interests; non-declaration of any conflict of interest that may exist in any matter that is being discussed by the Council; promoting factionalism amongst Council members to pursue various "hidden agendas"; trying to overturn some of the decisions made by the Vice-Chancellor; and attempting to isolate the Vice-Chancellor.[118] The non-adherence to proper meeting processes and procedures should be considered a serious governance failure. In some instances, the independent assessors found that minutes of meetings were inadequately prepared or in other cases, there were no minutes of meetings at all. Items were added to the agenda under "general", when in fact these items should have been accompanied by important documents which were needed for proper decision-making by the Council.[119]

Another concerning governance issue highlighted in HESA's report was the fraudulent relationships among the Council, the Vice-Chancellor and other staff members. In most of the independent assessor reports, the relationships among Council members and the Vice-Chancellor as well as the executive management were signalled as concerns. In some cases, Council members would side with executive management while in other cases the relationship between the Vice-Chancellor and the chair of Council became so strained, that it negatively affected the governance and management of the institution. It also became apparent that in some

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[118] HESA "Analysis of recent assessor reports of universities in SA" 2012 (Unpublished report prepared for the HESA workshop on 19 July 2012 and adopted by the HESA board on 17 October 2012) 9 – 10; DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 25.

[119] HESA "Analysis of recent assessor reports of universities in SA" 2012 (Unpublished report prepared for the HESA workshop on 19 July 2012 and adopted by the HESA board on 17 October 2012) 10 - 11; DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 26.

instances, the leadership exercised by the Vice-Chancellor and executive management was questioned, notably where Vice-Chancellors acted indecisively.[120] It would, therefore, appear that Vice-Chancellors failed to exercise proper and accountable leadership.

During the period 1997 – 2000, the Minister of Education appointed assessors for five failing institutions where there were serious allegations of a breakdown in governance, maladministration as well as near collapse of their institutions. During that period, the Minister was within his rights to appoint an assessor in terms of section 43 of the Higher Education Act of 1997. An independent assessor was usually appointed to investigate the affairs of an institution where there was serious financial or maladministration at an institution; when the effective functioning of the Council of an institution was undermined; the Council had failed to resolve these issues, or the appointment would be in the best interest of an institution. The independent assessor then had to report the findings to the Minister. The Higher Education Act of 1997 at that time did not yet provide for the appointment of an administrator. By 1999, the various assessor's reports were indicative of the fact that intervention was needed at multiple institutions. This resulted in the amendment of the Higher Education Act of 1997 during 1999,[121] which allowed for the appointment of an administrator that would replace the Council of the institution as well as the Vice-Chancellor or both.[122] After the passing of these amendments in 1999, three institutions were placed under administration, namely the Vaal Triangle Technikon, the University of Transkei and the University of the North.[123]

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[120] HESA "Analysis of recent assessor reports of universities in SA" 2012 (Unpublished report prepared for the HESA workshop on 19 July 2012 and adopted by the HESA board on 17 October 2012) 10 – 13; DHET "Guidelines for good governance practice and governance indicators for Councils of South African public higher education institutions" December 2017 25 – 26; 27 – 28.

[121] This was done by way of the Higher Education Amendment Act of 1999.

[122] See s 6 of the Higher Education Amendment Act of 1999.

[123] CHE *Higher Education Reviewed: Two Decades of Democracy* 2016 114.

This research supports the amendments providing for the appointment of an administrator, as this officer plays a vital role in restoring sound corporate governance at institutions.

Some of the independent assessor reports mention ineffective institutional structures such as the Senate and the Institutional Forum. These are essential structures in any public institution. However, according to these reports, it would appear that these bodies had become weak and ineffectual at those particular institutions.[124]

Apart from the universities that were investigated by independent assessors or those that were placed under administration as discussed in this research, there are also instances of misconduct at universities that are worth mentioning. The Department of Higher Education and Training did not involve themselves in these matters but instead left it to the universities to resolve.[125] Two examples are the University of Johannesburg and the University of Western Cape. In the first matter, the Chairperson of Council, as well as the Deputy Vice-Chancellor Finance of the University of Johannesburg, stepped down from their positions during June 2017, pending a forensic investigation after irregularities emerged regarding the commercialisation processes of the university.[126] These allegations included the issuing of fraudulent invoices and the syphoning off money intended for a university project into their private companies.[127] Subsequently, the

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[124] HESA "Analysis of recent assessor reports of universities in SA" 2012 (Unpublished report prepared for the HESA workshop on 19 July 2012 and adopted by the HESA board on 17 October 2012) 14. It is important to note that s 31 of the Higher Education Act of 1997 was amended to state that the Council must consider the IF's advice or provide written reasons for not accepting the advice.

[125] Although there are several other matters that were also reported in the media, it is not the intention of this study to discuss all these reported matters in detail. These two examples provide good examples of instances where the Minister did not involve himself in the governance challenges of universities.

[126] Confirmed in a UJ circular to employees dated 20 July 2017.

[127] Ritchie G "Former UJ Execs Ordered to Cough up the Money" 2018-08-31 *Mail & Guardian*.

Chairperson of Council resigned from his position, and the Deputy Vice-Chancellor's services were terminated.[128] Moreover, a further forensic investigation was requested after various allegations were made regarding possible irregularities by the then Vice-Chancellor and the Chairperson of the convocation.[129]

The second matter is the decision in *Williams and another v UWC and Others* 2015 (25437/2015) WC. This case dealt with the situation where two members of the UWC Council were suspended after they attended certain student meetings relating to the #FeesMustFall movement. The applicants challenged this decision in court and stated that their suspensions were unlawful. They requested the court to reinstate them as Council members. UWC opposed this application. The applicants were appointed to the Council, representing the Convocation. It was also brought to the attention of the court that the chair of Council had been declared a delinquent director in terms of section 162(5(c)(iv)(aa) of the Companies Act of 2008. The court found in favour of the applicants as the Council had not followed due process in respect of two Council meetings dated 26 November 2015 and 30 June 2016. Therefore, the court declared that any decisions about the applicants taken by the respondents were invalid and set them aside. The applicants were restored as full Council members. These two instances are indicative that there is a need to strengthen governance.

Considering the abovementioned governance issues identified by the independent assessors during their investigations, it becomes patently clear that there is an urgent need for the improvement of governance in

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[128] Confirmed in a UJ circular dated 4 December 2017. See in general, Seale L "Fraud Suspect Fights Back" 2017-12-02 *Saturday Star*. See Tshwane T "2 Senior UJ Officials to Face Court over Fraud Charges" 2017-10-24 *EWN*. Davies M "UJ Professor Accused of Thieving Millions Resigns" 2017-10-29 *Huffpost*.

[129] Seale L "Fraud Suspect Fights Back" 2017-12-02 *Saturday Star*.

public higher education institutions. Discussed below are three examples of specific universities that were placed under administration.[130]

(b) Examples of universities placed under administration

Between 2008 and 2012, six universities were placed under administration.[131] A few of these universities were investigated or placed under administration more than once.[132] It is posited that this prompted the introduction of the Higher Education and Training Laws Amendment Act of 2012, and subsequently, the Higher Education Amendment Act of 2016. The independent assessors appointed for these universities were unanimous in their views that Council members did not fully understand their roles and functions and that this had been at the root of the problems experienced at those universities, ultimately leading to those institutions becoming dysfunctional. Various higher education stakeholders had indicated their concern with regard to Council members after so many universities had been placed under administration. They considered that

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[130] It is not the intention of this research to provide a detailed account of the independent assessors' reports or their findings; rather the focus is to highlight the governance irregularities at these institutions. These six institutions were chosen because of the type of irregularities that was investigated, which relates to mismanagement by executive management and the Council as well as other governance failings.

[131] These were the University of Zululand (UniZulu), Tshwane University of Technology (TUT), Walter Sisulu University (WSU), Vaal University of Technology (VUT), Central University of Technology (CUT), Mangosuthu University of Technology (MUT), University of Fort Hare, University of Durban-Westville, Durban University of Technology, University of Transkei, University of the North and the University of Limpopo. This research will discuss three of these six universities as examples of the type of inadequate governance practices and mismanagement of institutions. It is not necessary to include a discussion of the findings of all six universities. CUT is specifically discussed because of the court matter brought against the DHET by CUT; while MUT and UniZulu are discussed because of the governance inadequacies and the administrators' reports provided by the DHET for the purposes of this research. Administrator' reports are not public documents due their confidential nature. See HESA "Analysis of Recent Assessor Reports of Universities in SA" 2012 (Unpublished report prepared for the HESA workshop on 19 July 2012 and adopted by the HESA board on 17 October 2012).

[132] These universities include MUT, VUT, Fort Hare, University of Durban Westville and University of Fort Hare.

the Council members might not have been suited for their positions, or at the very least, unaware of their fiduciary duties.[133]

(i) Mangosuthu University of Technology (MUT)

This institution was chosen for this research due to the repetitive investigations into the affairs of this institution, as well as the nature of the investigations. The investigation highlights both governance and management issues at the institution. During 1999, an independent assessor was appointed to investigate an ongoing dispute at MUT. The assessor submitted his report to the Minister of Education in September 1999.[134]

In 2008, the Council of MUT again requested the Minister's intervention and the appointment of an independent assessor. An assessor was subsequently appointed, and it was clear from the terms of reference that there were serious concerns regarding governance and management at the institution.[135] The purpose of the investigation was to advise the Minister of Education as well as the Council of the institution on the sources and nature of the governance, management and administrative problems as these problems may have been impacting the effective functioning of the institution.

The terms of reference for the independent assessor included the following: to conduct an investigation and report on the current situation at the institution in terms of the organisation, management and governance

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[133]Macupe B "Poor Leadership Cripples Tertiary Institutions" 2012-07-30 *Sunday Times*.

[134] *Government Gazette* Nr. 20485 (GN. 2132) 12 September 1999; hereinafter referred to as the 1999 MUT Independent Assessor Report. This report will not be discussed in detail, as it does not relate to governance, but rather to strikes and disputes between the management and unions.

[135] *Government Gazette* Nr. 31480 (GN. None) 1 October 2008; hereinafter referred to as the 2008 MUT independent assessor report.

structures, processes, systems, policies and competencies, which include issues of accountability and responsibility; and to identify any authorities which have been delegated to the Vice-Chancellor and management in contravention of the statutes or good corporate governance.[136] One of the findings by the independent assessor was that Council had abdicated its responsibility for a prolonged period and that it had not exercised sufficient fiduciary duty for the affairs of the institution. The independent assessor's report was tabled at Council in June 2008 indicating the various corporate governance issues which included among other things: the institution had no audit committee and there was no internal audit function;[137] the external auditors were of the view that the Vice-Chancellor, and not the Council, was their client, which indicates that the Vice-Chancellor wanted to assume the role of Council. For instance, the engagement letter of the external auditors was signed by the Vice-Chancellor without proper authorisation from the Council. Furthermore, there was an indication that the Council had not had sight of any findings made by the external auditors for several years, which again indicates poor corporate governance practices. There was also no evidence of any delegation of authority by the Council to management (good governance dictates that Council should have a delegation in place to set the limits at different levels of the institution and finally to the Council). According to the Higher Education Act of 1997, the Council is the policy-making body of an institution. However, there was no evidence that any new policies or amendments to existing polices had been served before Council or Council committees and Council and sub-committee minutes were brief and not indicative of the actual discussions that took place at the meetings. It came to light that the Vice-Chancellor assumed responsibility for drafting the agendas and approving the minutes of these meetings, with no input from Council members.[138] Furthermore, the independent assessor could not find any evidence that the tender

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[136] *Government Gazette* Nr. 31480 (GN. None) 1 October 2008.

[137] This is a fundamental corporate governance requirement. See *King IV* 55 – 56.

[138] 2008 MUT Independent assessor report 6 – 8.

committee was functioning as no minutes of meetings could be found, despite the fact that large tenders were awarded or renewed. There was also a finding that an excess of half a million rands worth of equipment had been purchased for the Vice-Chancellor's farm. There were no tender documents for the purchase of the equipment.[139] There was also a serious breach of governance relating to contracts. In many instances, contracts had not been fully signed, which could have rendered them unenforceable. Despite this, payments had been made to contractors based on unsigned contracts. The external auditors had raised concerns about these unsigned contracts on a number of occasions, all of which were ignored.[140]

The independent assessor's report furthermore elaborated extensively on governance and management structures and other problems at the institution, and it seems that the institution had not been following good corporate governance practices. For instance, the Council had failed on numerous occasions to exercise its responsibilities and obligations. It became clear that the Council allowed the Executive Committee of the institution to exercise all its powers and functions without limitation, oversight or ratification. The Executive Committee had passed a resolution in 1998 that provided the Vice-Chancellor with powers to act in respect of "a management and administrative function", which was in fact, a function of the Council, in accordance with the MUT statute. Council accepted this resolution and never attempted to review it, which is not indicative of good corporate governance or effective management.[141] This resolution was in clear contravention of the MUT statute and the Higher Education Act of 1997. The tender committee also did not follow good corporate governance practices since procurement took place without a proper tender process. It was also found that appointed companies did not enter into written contracts, as the Vice-Chancellor was reluctant to sign such contracts. It

[139] 2008 MUT Independent assessor report 6 – 8.

[140] 2008 MUT Independent assessor report 12

[141] 2008 MUT independent assessor report 14.

became apparent that there was no practice in place for Council members to declare any interest and that employees of the institution lived in fear of the Vice-Chancellor. The Vice-Chancellor had installed a system that enabled him to survey the building in which his offices were located and had authorised the installation of an illegal system to record the telephone conversations of various employees secretly. It became apparent to the independent assessor that the management practices rather were guidelines, and compliance was voluntary. Moreover, the management practices were centralised under the authority and direct control of the Vice-Chancellor.[142] Consequently, the independent assessor recommended that Council formally suspend the Vice-Chancellor pending further investigation and the formulation of charges against this individual; that Council requests the Minister to repeal the MUT statute and appoint an administrator in terms of the Higher Education Act of 1997.

The administrator was appointed in January 2009[143] with terms of reference to, amongst other things: take over the authority of the management and administration of the institution; identify and initiate processes and initiatives to restore proper management and administration at the institution; assist Council to restore adequate governance at the institution, including constituting proper Council sub-committees; amend the statute of the institution; and conduct a forensic investigation, as recommended by the independent assessor.[144]

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[142] 2008 MUT independent assessor report 16.

[143] No *Government Gazette* could be found. Upon request, the DHET confirmed that the administrator was appointed as of 27 January 2009, and he assumed his duties on 1 February 2009. This information was confirmed by email on 8 February 2018 by the DHET. The administrator delivered his final report as early as 18 July 2009, which is a short period of time in which to have attended to the administration of this institution, especially in light of the serious allegations of fraud and corruption. The report was not very detailed with respect to the processes that had been implemented. The report also contained no information on the changes made to the tender committee.

[144] The terms of reference were provided by the DHET by email on 8 February 2018.

The administrator had attended to the following:[145] the Vice-Chancellor, who faced serious charges, was suspended;[146] a new Council was constituted;[147] the forensic investigation, as recommended by the independent assessor, was concluded and recommendations were made for the consideration and implementation of the administrator.[148] He also prepared and submitted a new institutional statute for the Minister's consideration.[149] As indicated in the independent assessor's report, some of the contracts that had been concluded did not follow proper governance processes. Although the report indicated problems with the process relating to the conclusion of contracts in general, the administrator's report only referred to cleaning and catering contracts.[150] It is, therefore, unclear whether the full contracting process of the institution had been revised or not. Finally, the administrator also attended to various policies, plans, procedures and programmes to assist the management, administration and governance of the institution. The implementation and continuation of the latter should have been a top priority.[151] It is clear from the independent assessor's findings that this institution faced serious corporate governance challenges and that it operated with a weak executive management. The Council did not understand its role and function and allowed a Committee to make decisions and act on its behalf. Moreover, the Vice-Chancellor seemed to

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[145] The administrator's report will not be discussed in detail; only matters relating to governance are referenced.

[146] The suspension of the Vice-Chancellor turned into a legal battle, with the Vice-Chancellor lodging an urgent application in the labour court, which was later withdrawn. Senior counsel represented both parties during the disciplinary process. The appointment of a new Vice-Chancellor had to wait until the legal process had been concluded or the conclusion of his contract reached, which was at the end of 2009. MUT administrator's report 1.

[147] This new Council reflected significant change in the form of new members and the reinstatement of certain external members of Council.

[148] MUT administrator's report 2 – 3.

[149] MUT administrator's report 10.

[150] See MUT administrator's report 13.

[151] MUT administrator's report 18. The latter report does not elaborate on what these plans, processes and programmes were.

have total disregard for the fiduciary duties owed towards the institution, and instead, he was running a form of dictatorship.[152] None of these elements is conducive to a well-functioning institution.

Despite the administrators' best efforts, it seems that there is still no end in sight to the leadership and governance challenges at the institution. In 2011, the CHE attended to an audit of the institution.[153] In February 2015, the Executive Committee of Council took a decision to conduct a forensic investigation into the affairs of the institution to address the lack of information provided by management to Council and various procurement issues. This led to a number of interactions between the Minister and the Council. In March 2016, the Minister raised concerns to the Council regarding the various outstanding issues at the institution. He requested the Council to address these concerns and provide him with a report. Should the Council fail to do so, an independent assessor would be appointed. It became apparent that both the Council and management were uncertain as to which governing functions were vested in Council and which were vested in management. The Minister advised the Council that, with the concurrence of the Council, an independent assessor could be appointed without suspending the operations of the Council or executive management of the university. The Minister advised that it would be in the best interests of the university to allow such an investigation as it would be neutral. The Minister received no response from the Council and wrote follow-up letters in June and September 2016, reiterating his concerns that were initially raised in March 2016. The university eventually replied and confirmed that a forensic investigation had been conducted in July 2016. The Minister received a copy of the report submitted by the forensic investigation team, identifying the various shortcomings at the institution. These shortcomings included *inter alia*, ineffective policies and procedures

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[152] 2008 MUT independent assessor report 13, 15 – 17.

[153]The CHE's report was submitted in January 2012, see http://www.che.ac.za/sites/default/files/institutional_audits/institutional_audits_2011_mut_executive_summary.pdf (Date of use: 3 September 2018).

and a number of instances where senior management had failed to follow the policies or procedures of the institution.[154] In April 2017, there was a rather large reconstitution of the Council.[155] Subsequently, in October 2017, the newly elected chairperson of the Council requested the Minister to approve the Council resolution taken in September 2017 to appoint an independent assessor to investigate the affairs of the university and report to the Minister.[156] In May 2018, the Minister appointed an independent assessor for this institution.[157] His terms of reference were to among other things, identify the source and nature of the problems facing the institution, particularly those relating to the governance and management; indicate governance and management failures; propose measures to restore good governance and management; provide a report on the current situation of the university governance and management, and report on the functions and powers of the Council committees.

The independent assessor's report[158] made a few interesting statements and recommendations. The fact that an independent assessor has been appointed three times, while an administrator was appointed twice, shows that the institution is facing a governance crisis. One of the main issues that is clear from the latest independent assessor's report is the fact that

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[154] This information was obtained from a presentation by the DHET to the Portfolio Committee of Parliament on 13 September 2017. See https://pmg.org.za/committee-meeting/25005/ (Date of use: 3 September 2018).

[155] Presentation made by MUT to the Portfolio Committee of Parliament on 13 September 2017.

[156] This information was obtained from a presentation done by the DHET to the Portfolio Committee regarding the status at some of the universities. This meeting took place on 22 November 2017, see https://pmg.org.za/committee-meeting/25563/ (Date of use: 3 September 2018). To date the appointment has not been made.

[157] *Government Gazette* Nr. 41643 (GN. 514) 22 May 2018. See in general Pityana NP "Communique from the Independent Assessor" 25 May 2018 https://www.mut.ac.za/communique-from-the-independent-assessor/ (Date of use: 3 September 2018).

[158] *Government Gazette* Nr. 42053 (GN. 1266), hereinafter referred to the 2018 independent assessor report. 23 November 2018. For reference purposes, the bottom page number of the *Government Gazette* is used. Hereinafter referred to the independent assessor's report 2018.

there is a breakdown between the Council and its management. Further to this, the Council did not have an understanding about who would be a "fit and proper" person to serve on Council. The question arose as to whether the right level of skilled and experienced Council members had been recruited to serve on MUT's Council. The independent assessor confirmed that all Council members must act in the best interest of their institution, and also referenced the fact that board members of companies may be held personally liable for any wrongdoing during their term of office as directors in terms of the Companies Act of 2008.[159] Further to this, the independent assessor referred to the office of the Registrar, which is critical to governance and management within the institution. In this instance, despite the Registrar being in office for 20 years, he did not seem to understand that he was the custodian of the laws, policies and rules of the institution. According to the independent assessor, the Registrar's function should be similar to that of a company secretary, and he/she should at all times act with authority and with the relevant knowledge of the laws and policies of the institution binding on Council and the management. The author subscribes to this view. The independent assessor was of the opinion that the Registrar was unable to advise the institution about matters relating to compliance, nor was he able to confront and address wrongdoing[160]

Despite the appointment of previous independent assessors and administrators as well as a forensic investigation concluded during 2017, the management and governance problems persist at this institution. Some of the findings of the independent assessor included among other things the following: there were no clear systems of accountability at the institution; there was a serious threat of a total breakdown of governance

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[159] 2018 MUT Independent assessor's report 2018 20-21. See the discussions on liability for breaches in terms of Chapter 4, para 4.2.8 below. Recommendations are also made in Chapter 6 below regarding amending the Higher Education Act of 1997 to include similar provisions.

[160] 2018 MUT Independent assessor's report 2018 22 – 23.

systems unless the trust between the Council and management could be restored; all members of the Council should be required to undergo assessment by an independent body; all elected Council members should act in the best interest of the university and not the external stakeholders that elected them; there is a need for a review of the management system to address non-performance and lack of capacity; the casual attitude of the Registrar and his lack of understanding of governance and compliance is of great concern; new Council members should be carefully elected to ensure that good governance is their key priority; the Council should adopt a procedure to discipline Council members for the violation of the code of conduct as well in instances where they fail to act in the best interest of the university; the relationship between the chair of Council and the Vice-Chancellor, as well as the Council and the Executive Management, must be restored; and the university must establish an office of the ombud.[161]

The recommendations made by the independent assessor were as follows: The Minister of Higher Education and Training should consider the introduction of a separate office of a University ombud. This office should be independent, and its powers and mandate should be provided for in the Higher Education Act 101 of 1997. The university must ensure that it implements proper policies and procedures to assist the institution in addressing the various shortcomings in areas like human resources and supply chain management. Instead of appointing an administrator and placing the institution under administration, the university should be assisted with a development approach over a five-year period of time. However, the Council should be disbanded in its entirety and replaced with new appointees - these appointments should follow a thorough nomination and election process and credible individuals should be appointed to Council. A comprehensive review of the strategic plan for the university must be undertaken.[162]

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[161] 2018 MUT Independent assessor's report 107 – 113.

[162] 2018 MUT Independent assessors' report 66 – 74.

The fact that this institution faced the same types of governance problems relating to an ineffective Council, the breakdown of the relationship between the Council and the executive management, the lack of accountability as well as the Registrar's lack of understanding of governance and compliance are of great concern. The 2018 independent assessor's report indicates that the Registrar has been in office for over 20 years. This problem should have been discovered and addressed during the 2008 investigation into the affairs of the institution. No information could be found on the current status of the institution, but it would not be surprising if an administrator is appointed again.

(ii) University of Zululand (UniZulu)

The reason for including the University of Zululand is that the allegations that were made relating to mismanagement and corruption as well as the fact that their governance problems seem to be continuing. The mismanagement occurring at the institution was clearly contributing to the governance problems.[163] Currently, UniZulu is faced with renewed allegations of mismanagement and corruption, despite it having been placed under administration in 2011.[164] In November 2010, DHET appointed an independent assessor to investigate the affairs of this institution.[165] The terms of reference that were provided to the independent assessor during 2010 among other things included the following: to conduct an investigation into the management structures and their efficiency; and to conduct an investigation into the financial policies and procedures of the university, with specific emphasis on internal audit processes as well as tender and procurement processes.

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[163] Although the focus is on governance, some of the serious management issues were also discussed as they contributed to the overall governance problems at the institutions.

[164] Govender P "Blade Reads the Riot Act to UniZulu" 2016-11-09 *Mail & Guardian* r

[165] *Government Gazette* Nr. 33754 (GN. 1054) 12 November 2010.

The independent assessor's report was published in March 2011 and identified both management and governance issues.[166] The findings in the report were of a serious nature, and urgent action was required to ensure that the mismanagement and irregularities were addressed and corrected. The findings included the following: There was a dysfunctional relationship between the Council and the Vice-Chancellor; certain Council members were serving perpetual terms; some Council members were not competent to serve on Council; there were various governance shortcomings with regards to the functioning of the Council, and the Council assuming an operational role within the institution. Internal and external reports were submitted to the Council for corrective action, but there was no evidence that any action had ever been taken. There were serious irregularities with regards to tender and procurement processes that needed to be addressed, with evidence pointing to Council members and their family members being involved in companies or businesses that received tenders from the institution.

According to the independent assessor, the institution was in serious trouble, and immediate intervention was required to assist it to recover. The independent assessor made the following recommendations to the Minister: the Council must be dissolved, and an administrator must be appointed to take over its function; a new Council must be constituted which will act in the best interests of the institution and that any conflict of interest must be avoided during the course of their appointments as Council members; the audit findings of the CHE must be implemented;[167] and a forensic investigation must be conducted to investigate and establish the cause of the various malpractices.

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[166] *Government Gazette* Nr. 34156 (GN. 172) 25 March 2011.

[167] The audit report was published in December 2010 and can be viewed at http://www.che.ac.za/sites/default/files/institutional_audits/institutional_audits_2010_unizul_executive_summary.pdf (accessed on: 3 September 2018). The recommendations are presented on pages 6 – 26 of this report.

In April 2011, the Minister of Higher Education and Training appointed an administrator to the institution and provided him with a term of reference.[168] The administrator submitted his final report to the Minister in March 2013.[169] Included in his mandate was to take authority over the Council for a period of two years, and to restore good governance and administration. The administrator, with the assistance of the Council and the Council committees, developed various policy guidelines to restore good governance and good governance practices.[170] Throughout his administration term, the administrator maintained full-time involvement in the governance and associated fiduciary responsibilities as well as the administration of the institution. This included the development of formal structures and protocol to restore good governance and administration. The administrator also drafted a new statute for the university, which was gazetted in October 2012.[171] Various audits were conducted during the administration period, and the findings and recommendations were implemented. These audits uncovered serious and repeated transgressions of the institution's policy and procedures and included acts of fraud, theft and corruption by Council members, management, employees and students of the institution. Disciplinary action was brought against the implicated students and staff, and criminal charges were filed where applicable. Following this, the institution reviewed its policies and procedures to prevent a recurrence of such practices.[172] The administrator indicated that it was crucial for the institution that there be an institutional commitment from

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[168] *Government Gazette* Nr. 34212 (GN. 343) 15 April 2011.

[169] The confidential administrator's final report as well as the interim reports were made available to the researcher for the purposes of this study. The interim reports were submitted in May 2012 and June 2012 while the final report was submitted in March 2013.

[170] Final administrator's report 2. These included rules for the appointment of senior management, codes of conduct for members of Council, students and staff as well as a policy on fraud and corruption.

[171] *Government Gazette* Nr. 35784 (GN. 843) 12 October 2012.

[172] Final administrator's report 3.

all staff to good governance and administration. He cautioned that all of the policies drafted and implemented during his term were no guarantee of good governance and stressed that there must be a commitment and good example set by senior management to uphold these principles.[173] The administrator also constituted a new Council before the end of his term.

However, despite the administration period and the implementation of various policies and procedures to improve and strengthen the governance of the institution, problems persisted. During 2014, the institution was faced with a number of issues relating to its academic welfare. Following violent student protests during 2015, the Minister of Higher Education and Training met with the Council of the institution.[174] It was decided to appoint a task team to assist the Council in dealing with the continued challenges that the institution was facing. However, after the failure of the Council to co-operate with the DHET to draft the terms of reference for this task team, the Minister again met with the Council and requested them to submit a report to him regarding the post-administration period.[175] The Minister reviewed the reports received from Council and subsequently forwarded a letter to the chairperson of Council reiterating the DHET's concern over the slow progress at the university on various matters, which included poor governance practices and maladministration. The Minister requested the Council to provide him within fourteen days with reasons as to why he should not appoint an independent assessor again to investigate these allegations. The Council then submitted a full report to the Minister by December 2016. The Minister also requested the CHE to conduct an institutional audit,[176] which was duly completed. A report was submitted to

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[173] Final administrator's report 12.

[174] This meeting took place on 28 April 2015.

[175] This meeting took place on 13 November 2015.

[176] This information was contained in a presentation by the DHET to the Portfolio Committee of Parliament on 13 September 2017. See the presentation, https://pmg.org.za/committee-meeting/25005/ (Date of use: 3 September 2018).

the Minister for review and consideration. The CHE was provided with a mandate to investigate the affairs of the institution and establish how the administrator's recommendations, which included recommendations relating to governance, were implemented.[177] The Minister was also concerned about the continued negative media reports regarding the allegations of mismanagement and corruption at the institution.[178] The fraud and mismanagement occurred as a direct result of poor governance practices. However, the institution denied these allegations in 2017 when it appeared before the Portfolio Committee in Parliament.[179] Following this, the Minister of Higher Education and Training provided the institution with a deadline by which it needed to reopen the investigation into alleged fraud and mismanagement. Although the university had investigated these allegations, the Minister was not satisfied and requested that the Council appoint independent forensic investigators to conduct a similar investigation.[180] The current status of governance at the university is unknown, except that no appointment for an administrator could be found in the *Government Gazettes*.

(iii) Central University of Technology

The Central University of Technology (CUT) is considered due to the legal dispute, which ensued between the Minister of Higher Education and

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[177] This report included 17 recommendations and 4 commendations. One of the recommendations of the report was that the governance of the institution must improve. https://pmg.org.za/committee-meeting/25928/ (Date of use: 18 September 2019).

[178] Govender P "Blade Reads the Riot Act to UniZulu" 2016-11-9 *Mail & Guardian*; Ntuli N "Claims of Mismanagement and Maladministration Hound the Institution" 2017-08-27 *Sunday Tribune*.

[179] See the minutes of the meeting held on 13 September 2017, https://pmg.org.za/committee-meeting/25005/ (Date of use: 3 September 2018); *ENCA* "Pandor to Intervene at the University of Zululand after Alleged Corruption" 2018-05-05.

[180] It is believed that the Minister issued this directive directly to the Council in a confidential document, as no published directive could be found. See Makhaye C and Mkhize N "University of Zululand gets Deadline to Reopen Fraud Probe"2018-06-28 *Business Day*.

Training and the Council of CUT when an administrator was appointed for the institution.[181] Moreover, the discussion below relating to the finding against the Minister of the Department of Higher Education and Training also played a role in the subsequent enactment of the Higher Education Amendment Act of 2016.[182]

An independent assessor was appointed on 28 February 2012 to investigate the affairs of the institution.[183] The allegations included an abuse of power, misuse of funds and poor governance practices, administration and management of the university. Some of the findings made by the independent assessor were the following: the Council had inadequately handled an anonymous memorandum sent to the Minister containing allegations of mismanagement and misuse of funds;[184] the Council had not adhered to good governance principles and had displayed an undesirable level of compliance with its fiduciary responsibilities, and there had been financial mismanagement at the institution.[185]

The independent assessor made the following recommendations to the Minister: the Council must be dissolved and an administrator appointed to

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[181] Macfarlane D "Blade puts CUT's Finances under the Microscope" 2012-03-06 *Mail & Guardian*.; Pretorius C "Universities may take Minister to Court over Autonomy" 2012-12-16 *University World News*.

[182] See the University of Pretoria's submission on the Higher Education and Training Amendment Bill 2012 (8 October 2012) https://pmg.org.za/committee-meeting/14944/. The Higher Education Amendment Act of 2016 is discussed in para 3.4 below.

[183] *Government Gazette* Nr. 35084 (GN. 167) 28 February 2012.

[184] One of the aspects that was singled out as of particular concern was the so-called KPMG Report, which was a first aborted attempt at an investigation into the affairs of CUT. Although the existence of this report was first denied, the independent assessor could establish beyond reasonable doubt that the KPMG report existed and had indeed been handed in at the Registrar's office. Subsequent to the KPMG investigation, there was also an investigation by adv. Jannie Lubbe. The CUT also denied the existence of this report, although adv. Lubbe confirmed its existence to the independent assessor. The independent assessor was therefore of the opinion that the Minister had been misled concerning the existence of these reports.

[185] This research concentrates on the findings pertaining to governance. For all the findings, see the independent assessor's report 15 – 16 as well as CUT's on https://pmg.org.za/committee-meeting/15240/ (Date of use: 3 September 2018).

fulfil the duties of Council while a new Council was being established; the Vice-Chancellor must be placed on special leave, pending the outcome of a further investigation;[186] the administrator must pay special attention to the alleged conduct of the Deputy Vice-Chancellor: Institutional Planning, Partnerships and Communication; the KPMG investigation must be reactivated, and a forensic audit concluded.[187]

Following these recommendations,[188] the Minister appointed an administrator for the institution. The administrator's terms of reference included the following: take over the authority of the Council of the university for a period not exceeding 12 months; take over the authority of the university management and restore proper governance, management and administration at the university; steer the university back to operational sustainability through the appointment of new Council members and the establishment of an effective Council; conduct a forensic audit into the various allegations of irregularities; draft and submit a new institutional statute for the university; implement the necessary governance and management operations, and undertake a review of past and present labour relations matters. The CUT refused the appointed administrator access to the campus and approached the court.[189]

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[186] However, in the event that it was decided that the Vice-Chancellor continue in his position, the new Council would have to decide on his future as well as the terms and conditions of his appointment. According to the independent assessor, various allegations of abuse of power and victimisation had been made against the Vice-Chancellor and it would therefore have been best if the investigation could have been continued in his absence. See independent assessor's report 4 – 5.

[187] Only the recommendations relating to governance are included here. For all the recommendations, see the independent assessors' report 3 – 5. KPMG was instructed to undertake an investigation by the Council prior to the independent assessor being appointed.

[188] *Government Gazette* Nr. 35457 (GN. 476) 20 June 2012.

[189] *Minister of Higher Education and Training and Others v Mthembu and Others, Council of Central University of Technology, Free State v Minister of Higher Education and Training and Others* (2776/2012, 2786/2012) ZAFSHC 144. See also Macfarlane D "Heavy-handed Nzimande Prepares to Face-off against CUT" *Mail & Guardian* (date published: 21 June 2012).

In doing so, the CUT became the first university to challenge the Minister's appointment of an administrator, who had the power to dissolve its Council. The Council of CUT lodged an urgent application[190] for the review and setting aside of the Minister's decision to appoint an administrator for the institution. On the same day, the Minister also applied to the court[191] for an order compelling the CUT Council to give effect to the notice and to transfer authority, powers, functions and duties to the administrator.[192] Daffue J granted leave for both applications to be heard simultaneously. The court had to determine whether the Minister had exercised his powers lawfully, reasonably and within the powers afforded to him by section 41A of the Higher Education Act 101 of 1997.[193] The following disputes were raised between the parties: whether or not the CUT Council had *locus standi* in the review application with regards to the interpretation of section 41A;[194] whether the Minister's decision was based on procedural grounds;

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[190] *Minister of Higher Education and Training and others v Mthembu and others* (case nr. 2786/2012) in the Free State High Court, Bloemfontein.

[191] *The Council of Central University of Technology, Free State v The Minister of Higher Education and Training and others* (case nr. 2776/2012) in the Free State Higher Court, Bloemfontein.

[192] The legal representatives for both parties argued that the "*Plascon-Evans* rule" should be applied in adjudicating the two applications. In terms of this rule, the undisputed allegations in the founding affidavits, observing the allegations in the answering affidavits that are not clearly untenable; have to be taken into consideration in order to find whether a proper case has been made out by the respective applicants. See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634 H – 635 C. In the CUT case, this was difficult since the allegations contained in the founding affidavit of the Minister's application were also relied upon by the Minister in his answering affidavit in the Council application and vice versa. See para 14 of the *Minister of DHET v Mthembu* decision.

[193] *The Council of Central University of Technology, Free State v The Minister of Higher Education and Training and others* para 15.

[194] This section provided for the following: "If an audit of the financial records of a public higher education institution, or an investigation by an independent assessor as contemplated in s 47, reveals financial or other maladministration of a serious undermining of the effective functioning of a public higher education institution, the Minister may, after consultation with the Council of the public higher education institution concerned, if practicable, and notwithstanding any other provisions of this Act, appoint a person as administrator to take over the authority of the council or the management of the institution and perform the functions relating to governance or management on behalf of the institution for a period determined by the Minister, and such period may not exceed two years. The Minister may extend the period referred to in subsection (1) once for a further period not exceeding six months, withstanding

whether a proper case had been made out for the Minister's declaratory orders; and whether the Minister had made out a proper case for the interdicts sought.[195] The court found that the CUT Council had the relevant *locus standi* to challenge the Minister's decision.[196]

The CUT Council argued that section 41A does not provide for the takeover of both the governance and management functions. They furthermore argued that the wording of section 41A was clear and accordingly, the administrator could only take over the Council *or* the management of the institution, but not both. The CUT Council argued that the word "or" in section 41A(1) should not be construed to mean "and" or "and/or".[197] The DHET, on the other side, argued that it was suitable to interpret "or" also to mean "and/or." Furthermore, it was the legislature's intention to provide for a solution where the investigation concluded by the independent assessor revealed financial or maladministration of a serious nature or the serious undermining of the effective functioning of a university. It did not matter whether or not the problems were caused by the Council or the management of the institution or both.[198] The court found that it was not the legislature's intention that the Minister could act only in the event of either financial or other maladministration of a serious nature; or whether there was a serious undermining of the effective functioning of a public higher education institution. Furthermore, the court held that where financial or

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subsection (1), if a Council is deemed to have resigned as contemplated in s 27(8), the Minister must appoint a person for a period of no longer than six months as an administrator on behalf of the institution to take over the authority of the Council; perform the Council's functions relating to governance; and ensure that a new Council is constituted."

[195] *The Council of Central University of Technology, Free State v The Minister of Higher Education and Training and others* para 15.

[196] *The Council of Central University of Technology, Free State v The Minister of Higher Education and Training and others* para 23.

[197] *The Council of Central University of Technology, Free State v The Minister of Higher Education and Training and others* para 26 – 27.

[198] *The Council of Central University of Technology, Free State v The Minister of Higher Education and Training and others* para 28.

other maladministration exists, the serious undermining of the effective function of the institution may also exist. The court found it incomprehensible that the Minister should not be able to act where a university was defective and embroiled by severe governance and management issues. According to the court, it was commendable that governance and management should be kept separate, and it was clear that the legislature's intention was for the Minister to appoint one person as an administrator to take over both the authority of the Council as well as the management of the institution. If it had been the legislature's intention to keep these two functions separate, it would have provided for the appointment of two administrators instead of one. Therefore, the Minister's appointment of one administrator could not be regarded as *ultra vires.*[199]

Moreover, the CUT Council also alleged that the DHET's case was procedurally flawed, referring to three particular issues, namely, the assessor's report; the consultative process in section 41A(1) of the Higher Education Act of 1997; and the Minister's decision to appoint the administrator.[200] With reference to the assessor's report, CUT alleged that the report was vague insofar as there were no findings pertaining to the Council at the time;[201] that the report was sent to the Council without any of the annexures attached to it;[202] and the report was published in the *Government Gazette* before it was provided to the Council. The CUT Council was of the opinion that it had not been provided with a fair and adequate opportunity in compliance with the Promotion of Administrative Justice Act 3 of 2000 to present a response to the DHET and that the

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[199] *The Council of Central University of Technology, Free State v The Minister of Higher Education and Training and others* para 29 - 30.

[200] *The Council of Central University of Technology, Free State v The Minister of Higher Education and Training and others* para 32.

[201] The author agrees with this statement, as there were no substantial findings made against the Council in the independent assessor report.

[202] These annexures were not attached to the report published in the *Government Gazette* Nr. 35333 (GN. 366) 11 May 2012.

DHET had come to a conclusion that the independent assessor's findings were correct before he had even met with the CUT Council.[203] It should be noted that there was no express requirement for the Minister to provide the independent assessor's report to CUT's Council before its publication. Furthermore, the bulk of the report was not so vague that it was not reasonably possible to respond to it. The Council was provided with enough time to consider the independent assessor's report and provide the Minister with a lengthy reply and supporting documents.[204] The CUT Council was displeased that the Minister did not provide them with reasons for his decision to appoint an administrator. The Minister, however, felt that he had considered both the report of the independent assessor as well as the CUT Council's response and made an informed decision to accept the findings and recommendations of the independent assessor.[205] The court found that there had been no procedural unfairness on the part of the DHET.[206] The CUT Council also challenged the DHET on substantive grounds. This included that the Minister had no power to dissolve the Council, nor was the Minister empowered to appoint an administrator to take over both the governance and management functions of CUT. They felt that the Minister had exceeded his power as section 41A(1) does not provide the Minister with the power to dissolve an institution's Council. The court agreed that the Minister did not have the power to dissolve the Council of the institution. The next substantive ground relied on by the CUT Council was their opinion that the Minister could not simultaneously take over both the Council and the management of the institution. The

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[203] *The Council of Central University of Technology, Free State v The Minister of Higher Education and Training and others* para 32.

[204] *The Council of Central University of Technology, Free State v The Minister of Higher Education and Training and others* para 33.

[205] *The Council of Central University of Technology, Free State v The Minister of Higher Education and Training and others* para 33.

[206] *The Council of Central University of Technology, Free State v The Minister of Higher Education and Training and others* para 34. The Court furthermore found that even if it was wrong regards to the finding of no procedural unfairness, it is apparent form the papers that CUT was not prejudiced by the process that was followed. Para 35.

court, however, felt that it was not the intention of the legislature that the Minister must appoint two administrators to fulfil these two duties.[207] Furthermore, it was contended that section 41A(1) also did not authorise the Minister to rewrite the institutional statute of the institution, however, on this point the court found in favour of the Minister in light of the provisions of section 32 of the Higher Education Act of 1997, and the fact that the authority granted in terms of section 32 would have been taken over by an administrator should one have been appointed.[208]

The court commented that universities should enjoy freedom and autonomy in their relationship with the State, within the context of public accountability.[209] It is essential for the Minister and the DHET to accept that universities are autonomous, and they should not be allowed to intervene in the affairs of a university unless the jurisdictional facts in section 41A(1) are shown to exist.

Moreover, the court found CUT's response to the independent assessor's report impressive, but the court confirmed that it expected the Minister to deal with allegations and documentary proof as contained in their response prior to making his decision to appoint an administrator. The court found that the Minister's affidavits were vague and that the jurisdictional requirements, as contained in section 41A(1), had not been met. The Minister's decision had to be set aside since the appointment of the administrator was unlawful; however, there was not sufficient justification for setting aside the independent assessor's report, and the court, therefore, did not grant this order.[210]

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[207] *The Council of Central University of Technology, Free State v The Minister of Higher Education and Training and others* para 38 – 39.

[208] *The Council of Central University of Technology, Free State v The Minister of Higher Education and Training and others* para 40

[209] Institutional autonomy and public accountability are discussed above in para 3.2.1.

[210] *The Council of Central University of Technology, Free State v The Minister of Higher Education and Training and others* para 45 – 49.

The Minister was granted leave to appeal the decision,[211] but the parties subsequently came to an agreement, and the Minister did not proceed with his appeal. The parties agreed that a retired judge would be appointed to oversee matters at CUT and would make recommendations to the Minister.[212] Although the report was submitted, its contents were not made public, and it seems that very little has changed at the university.[213] The CUT judgment made legal history in the higher education environment. However, it should not preclude the Ministry from fulfilling its mandate with regards to universities where there are allegations of mismanagement or poor governance practices, as the decision was based on the specific facts.[214] It is posited that this judgment prompted the revision of the Higher Education Act of 1997 relating to the issuing of a ministerial intervention, the appointment, role and powers of both the independent assessor and administrator.[215]

The DHET has indicated that good progress has been made at CUT since the litigation in respect of the issues raised above. Yet, no details have been provided.[216]

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[211] See in general, *Higher Education News* "Minister Granted Leave to Appeal to put CUT under Administration" 2012-09-26.

[212] Information obtained from Mr Eben Boshoff, legal advisor to the Ministry, in an interview conducted on 28 July 2014.

[213] Various attempts were made to obtain an update on the status of this university subsequent to the report being submitted to the DHET. However, no response was received from the DHET in this regard. No public information could be found on the progression of the matter.

[214] For the purposes of this research a request for information in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA) to was submitted to the CUT pertaining to information regarding their court case that was not publicly available. The request was granted, but subsequent emails to the Registrar of the university have not been answered.

[215] See para 3.4.3 below for a discussion on the amendments relating to the administrator and the independent assessor.

[216] The DHET provided an update by way of an interview with Ms. Pearl Whittle, the responsible person for University administration, on 13 January 2018.

3.4 AMENDMENTS TO THE HIGHER EDUCATION ACT OF 1997

3.4.1 Introduction

A comprehensive review was undertaken by a Ministerial Task Team, constituted in 2013 at the request of several Vice-Chancellors and USAf. The task team was provided with terms of reference, which provided for among other things the following: taking the relevant changes in the higher education landscape into consideration; checking the Higher Education Act of 1997 and subordinate legislation for inconsistencies and contradictions; making recommendations on unresolved aspects relating to the transitional arrangements indicated in the Higher Education Act of 1997; considering the debates and issues on institutional autonomy and public accountability, and assessing whether these concepts were adequately covered in the Higher Education Act of 1997; considering appropriate measures and requirements related to the independent assessment, administration and post-administration processes of institutions; considering the institutional types and making recommendations regarding any changes; advising on the extent of any recommended changes; consulting with all relevant higher education stakeholders in carrying out this task, and developing and submitting a revised Higher Education Act of 1997 to the DHET for consideration.[217]

The first draft Amendment Bill was submitted to the DHET in November 2014 for its consideration, while the first official draft of the Bill was published a year later, in November 2015. Not all the recommendations made by the task team were accepted, notably, the recommendation on the regulation of universities establishing or acquiring an interest in a separate legal entity.[218]

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[217] The task team was requested to complete a revised draft of the Higher Education Act of 1997 by June 2014 to enable this draft to be tabled before Parliament in June 2015.

[218] It was recommended as part of s 20(5) of the Higher Education Act of 1997. See the recommendations proposed in this study in Chapter 6, para 6.4.2 below.

The DHET widely consulted with various stakeholders and allowed adequate time for stakeholders to submit their contributions on the Bill. The Higher Education Amendment Bill 2015 was published for comment, and according to the DHET, it sought to clarify various issues and lessen the vagueness of the powers afforded to the Minister.[219] Some of the amendments were aimed at improving the governance of higher education institutions. The amendments were incorporated in the Higher Education Act of 1997 by the Higher Education Amendment Act of 2016 and are discussed below.

3.4.2 Amendments relating to the improvement of governance

Commendable amendments have been made to section 27 of the Higher Education Act of 1997 with regards to the institutional governance of a public higher education institution. Section 27(5B)[220] of the Higher Education Act of 1997 previously provided that a member of Council of a public higher education institution was not eligible for reappointment under the circumstances contemplated in sections 49A(4)(a)[221] and 49E[222] of the Higher Education Act of 1997 or if he/she had been implicated in the report of the independent assessor duly appointed to investigate the matters of an institution. This provision was changed to include a reference to sections 49A(4)(a) and 49B(1)(1) of the Higher Education Act of 1997. Specific provision is now made in respect of a Council member against whom an independent assessor has made an adverse finding, instead of simply implicating the member in his/her report. Such a member of Council would not be eligible for appointment, election, re-appointment or re-election as a

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[219] See the Department of Higher Education and Training's briefing on the Higher Education Amendment Bill (B36-015) (meeting date: 27 January 2016) https://pmg.org.za/committee-meeting/21947/ (Date of use: 3 September 2018).

[220] This was amended by s 8(c) of the Higher Education Act of 2016.

[221] This provided for the intervention by the Minister.

[222] This provided for dissolution of Council.

member of a Council of any public university. This section, therefore, widens the scope of disqualification of a Council member against whom an adverse finding was made. However, the legislation does not provide guidance regarding the implicated Council members' continued appointment. The section should provide for an implicated Council member to be removed and not be able to continue with his/her duties in this capacity. Furthermore, it is proposed that the scope of this provision should have been extended to include members of executive management who may not necessarily have been part of the Council of a higher education institution. Considering the findings that have been made by independent assessors against various members of executive management in the universities placed under administration, it would be in the best interests of public higher education institutions to widen the scope of disqualification of Council members in such a manner.[223]

Section 27(7)(c) of the Higher Education Act of 1997 provides for a declaration of a potential conflict of interest on an annual basis, unlike the previous provision which only required members to declare a conflict of interest upon assuming office. This amendment is welcomed as an interest may arise at any time after a member assumes office. However, a conflict of interest is not adequately defined, which may lead to inevitable conflicts of interest not being declared.[224] Business, commercial and financial activities may have other implications and interests, other than just financial gain. Although this amendment is welcomed, it will also increase

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[223] See Chapter 6, para 6.3 below for the proposed amendments to the Higher Education Act of 1997.

[224] Section 27(7)(c) of the Higher Education Act of 1997 as amended by s 8(e) of the Higher Education Amendment Act of 2016. See the definition of "conflict of interest" in *King IV* on page 11, which states the following: "A conflict of interest, used in relation to members of the governing body and its committees, occurs when there is a direct or indirect conflict, in fact or in appearance, between the interests of such member and that of the organisation. It applies to financial, economic and other interests in any opportunity from which the organisation may benefit, as well as use of the property of the organisation, including information." It also applies to a member's related parties holding such interests. See Chapter 6, para 6.3 below with regards to recommendations in this regard.

the administrative burden on the institution as these declarations must be made annually, the records must be managed and stored, and the accuracy and completeness of the information must be determined.

Section 27(7)(e) of the Higher Education Act of 1997 states that a Council member may not have a conflict of interest with the institution nor may a member have a direct or indirect financial, personal or other interest in a matter discussed at any meeting. The member must also inform the chairperson of the meeting in writing of the existence of such a conflict. Section 27(7A) of the Higher Education Act of 1997 previously provided for a person to inform the chairperson of a meeting of any conflict or possible conflict of interest of a Council member in writing before the meeting. The amended section 27(7A) of the Higher Education Act of 1997 now includes reference to Council committees, not only to Council.[225] Section 27(7C) of the Higher Education Act of 1997 provided that a committee of Council with delegated functions in terms of section 68(2) of the Higher Education Act of 1997 may not take a decision on a matter considered by it if any member of the committee has a conflict of interest. Section 27(7C) of the Higher Education Act of 1997 was amended to widen its scope to include any employee with delegated functions in terms of section 68(2) of the Higher Education Act of 1997, instead of only referring to a committee of the Council having delegated functions. It furthermore now dictates that the individual concerned, having the conflict of interest or possible conflict of interest, may not take part in consideration of or decision on the matter - the matter must instead be referred to Council, having noted the individual's interest in it.[226] The amendments relating to the widening of the scope of a conflict of interest are welcomed.

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[225] Section 8(g) of the Higher Education Amendment Act of 2016.

[226] This section was amended by s 8(h) of the Higher Education Amendment Act of 2016.

Section 27(8) of the Higher Education Act of 1997 confirmed that in the event of 75% of the membership of Council resigning, it would be deemed that the whole Council had resigned. In this event, section 27(9) of the Higher Education Act of 1997 confirmed that a new Council must be constituted in terms of the institutional statute by the administrator appointed in accordance with section 49G of the Higher Education Act of 1997 within a period of six months.[227] It, therefore, appears that the amendments to section 27 of the Higher Education Act of 1997 are aimed at improving the governance of public higher education institutions, and they are thus welcomed.

Section 31 of the Higher Education Act of 1997 relates to the IF, providing that the IF must advise the Council on certain issues. Previously, it was silent on whether or not the Council must consider or accept the advice provided. This section was amended by adding that the Council must consider the advice given by the IF and provide written reasons if the advice is not accepted.[228] This amendment is welcomed as it strengthens the position of the IF[229] and will contribute to improving good governance at institutions.

Section 34(1) of the Higher Education Act of 1997 provides that all employees must be appointed by Council while section 34(2) provides that all academic employees must be appointed by Council after consultation with Senate. Section 34(2) of the Higher Education Act of 1997 was amended to include specific reference to the appointment of both the Principal and the Vice-Principal.[230]

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[227] This section was amended by s 8(j) of the Higher Education Amendment Act of 2016.

[228] Section 31(1A), inserted by s 9 of the Higher Education Amendment Act of 2016.

[229] See USAF's submission to the Portfolio Committee on Higher Education and Training on the Higher Education Amendment Bill (Bill 36-2015) http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160217UniSAf.pdf (Date of use: 3 September 2018).

[230] This section was amended by s 10(a) of the Higher Education Amendment Act of 2016.

Section 34(4)(a) of the Higher Education Act of 1997 now provides that employees must, in writing, before they assume office as well as in the event of any new interest arising, declare any business, commercial or financial conflict of interest.[231] This amendment is welcomed, although it may become an administrative burden to ensure that interests are properly declared and that their accuracy is verified.[232]

Section 34(5) of the Higher Education Act of 1997 provided that:

> …an employee may not conduct business directly or indirectly with the public higher education institution at which he or she is employed that entails or may entail a conflict of interest with the public higher education institution, unless the Council of such public higher education institution is of the opinion that (a) the goods, products or service in question are unique; (b) the supplier is a sole provider; and (c) it is in the best interest of the institution.

This section was amended to state now that not only should the Council be of this opinion, but it also needs to make a specific decision to that effect.[233] This amendment is welcomed as it is aimed at minimising the possibility of corruption when contracts or tenders are awarded.

Section 34(6) of the Higher Education Act of 1997 was amended to provide that an employee may not on behalf of the public higher education institution concerned, contract with himself or herself or his or her relative[234]

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[231] This section was amended by s 10(b) of the Higher Education Amendment Act of 2016.

[232] See the submission on the Higher Education Amendment Bill of 2015 by Prof Derek van der Merwe on behalf of the South African Parastatal and Tertiary Institutions Union (SAPTU) dated 9 February 2016.

[233] This section was amended by s 10(d) of the Higher Education Amendment Act of 2016.

[234] A definition of "relative" was inserted by s 1 of the Higher Education Amendment Act of 2016 and states the following: "relative" in relation to any person means the spouse or partner of that person; anybody related to that person or his or her spouse within the third degree of consanguinity or affinity; or any adoptive child within the first degree of consanguinity. It furthermore also now includes a definition of "spouse" which means a person's partner in a marriage recognised as such in terms of the laws of the Republic or a foreign country or concluded in terms of religious rites.

or any entity in which the employee or any relative has a direct or indirect financial, personal, fiduciary or other interest.[235] Previously, this section did not include mention of a relative of an employee nor did it include mention of a fiduciary interest. This is a welcome amendment as previously, any relative of an employee could benefit from tenders or procurement deals without declaring his/her relationship with the employee. Section 34(7) of the Higher Education Act of 1997 clarifies that the contracting, as referred to in subsection 6, refers to receiving any indirect or direct financial, personal, fiduciary or any other gain that was not included in the employee's employment contract.[236]

The changes to section 34 of the Higher Education Act of 1997 as a whole are welcomed, as they are aimed at improving governance relating to the declaration of interest by employees. Neither employees nor their relatives may contract with the institution without the Council making a decision as to whether or not the goods, services or products are unique to the supplier; the supplier is a sole provider; and whether the contract will be in the best interests of the institution. These amendments might encourage all institutions to improve their procurement and tender processes and ensure that proper registers are maintained to record all conflicts.

3.4.3 Amendments relating to ministerial interventions

(a) Issuing of a ministerial directive

The Higher Education Amendment and Training Laws Amendment Act of 2012 introduced section 49A to the Higher Education Act of 1997. This section gave rise to concern amongst stakeholders as it provided the Minister of Higher Education and Training with greater powers to intervene

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[235] This was amended by s 10(d) of the Higher Education Amendment Act of 2016.

[236] Amendment by s 10(d) of the Higher Education Amendment Act of 2016.

in the affairs of a public higher education institution; thereby threatening institutional autonomy.[237] In accordance with this section, the Minister could dissolve the Council and appoint an administrator to take over the functions of the Council. This section was subsequently replaced by section 42 of the Higher Education Amendment Act of 2016.[238] Section 42 of the Higher Education Act of 1997 now provides that the Minister may issue a directive to the Council of a public higher education institution[239] if the Minister, after having complied with the provisions of subsection (3),[240] believes that the Council or the management of that institution is involved in financial impropriety or the institution is being otherwise mismanaged; is unable to perform its functions effectively; has acted in an unfair, discriminatory or wrongful manner towards a person to whom it owes a duty under the Act or any other law;[241] has failed to comply with any law; has failed to comply with any directive given by the Minister in terms of section 39 of the Higher Education Act of 1997,[242] or has obstructed the Minister or a person authorised by the Minister in performing a function in terms of this Act. The directive issued in terms of section 42(1) of the Higher Education Act of 1997 must contain certain information.[243] Previously, section 49A of the

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[237] This section was inserted by s 11 of the Higher Education Amendment and Training Laws Act of 2012.

[238] This section was inserted by s 16 of the Higher Education Amendment Act of 2016.

[239] This was previously contained in s 49A, which was introduced by the Higher Education and Training Laws Amendments Act of 2012.

[240] This subsection provides that the Minister must, before making a decision, give notice to the Council of the intention to issue a directive; provide the Council with the reasons for the intended directive; and give the Council a reasonable opportunity to make representations.

[241] This matter is still not properly addressed in the Higher Education Amendment Act of 2016, as it is still too broad and remains open to exploitation by a disgruntled employee or student who wants to "get back" at the institution.

[242] Section 39, as amended by s 12 of the Higher Education Amendment Act of 2016, makes provision for the allocation of funds by the Minister.

[243] A directive contemplated in subsection (1) must state the nature and extent of the deficiency; the negative impact of the deficiency on the institution and or higher education in an open and democratic society; the steps which should be taken to remedy the situation; a reasonable period within which the steps contemplated in subparagraphs above, or any other steps contemplated by the higher education

Higher Education Act of 1997 only required that the directive state the nature of the deficiency; the steps which must be taken to remedy the situation; and it provided the institution with a reasonable period of time in which it needed to adhere to the directive. Section 42(1)(c) of the Higher Education Act of 1997 may prove problematic as this provision might be misused by staff or students. Furthermore, such an individual may have other remedies in law. The Minister might be placed in a position where he or she takes on the role of the courts or the Commission for Conciliation, Mediation and Arbitration (CCMA).[244]

It is recommended that this provision be deleted from this section in Chapter 6 below.[245]The revised section 42(2) of the Higher Education Act of 1997 now also states that the directive must state the negative impact of the deficiency on the institution and must indicate to Council the manner in which it needs to provide the information to the Minister.

Formerly the 2016 amendment in section 49A(4) of the Higher Education Act of 1997 stipulated that before the Minister made a decision under section 49A(1), the Council had to receive notice of the intention of the Minister to issue a directive; provide the Council with a reasonable opportunity to make representations to the Minister, and consider the representations made by the Council. Section 42(3) of the Higher Education Act of 1997 now requires that the Council be provided with the reasons for the intended directive.[246] USAf suggested that the latter section

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institution and approved by the Minister, must be taken; and the manner in which the Council of the public concerned must provide written information to the Minister in respect of compliance with the directive.

[244] See USAf's proposed amendments to the Higher Education Amendment Bill, submitted to the Portfolio Committee dated 15 February 2016 8 https://pmg.org.za/committee-meeting/22032/ (Date of use: 3 September 2018); and the University of Cape Town's submission to the Portfolio Committee dated 8 February 2016 https://pmg.org.za/committee-meeting/22010/ (Date of use: 3 September 2018).

[245] See Chapter 6, para 6.3.10 below for this recommendation.

[246] Section 49A(3) did not provide for this.

should also provide that the Council must be afforded a reasonable opportunity to rectify the failure. However, this recommendation was not accepted. It is posited that this latter amendment would have been a positive change as not all failures are egregious; some may be readily rectified without intrusive intervention.[247]

A necessary amendment was affected to subsection (4). Previously, section 49A(4) of the Higher Education Act of 1997 stipulated that "if the Council fails to comply with the directive within the stated period, the Minister *must* dissolve the Council and appoint an administrator to take over the functions of the Council". The latter provision is indicative of how the Minister could assert his powers over the institutions. Several higher education stakeholders criticised this provision as it provided the Minister with the power to dissolve the Council of an institution. The new section 42(4) of the Higher Education Act of 1997 provides for a more reasonable clause and confirms that should the Minister have reasonable grounds to believe that the Council of a public higher education institution has failed to comply with the issued directive or has failed to remedy the deficiency within a reasonable period of time, the Minister may, depending on the circumstances, appoint an independent assessor;[248] or appoint an administrator;[249] or take any other appropriate action allowed by the Act or any other law. The previous section 49A of the Higher Education Act of 1997 was unreasonable insofar as it endowed the Minister with the power to appoint an administrator and dissolve the Council immediately, thereby threatening the autonomy of the institution. The amendment of section 42(4) of the Higher Education Act of 1997 provides the Minister with additional options to consider before appointing an administrator and is thus welcomed.

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[247] See USAf's proposed amendments to the Higher Education Amendment Bill, submitted to the Portfolio Committee on 15 February 2016 7 https://pmg.org.za/committee-meeting/22032/ (Date of use: 3 September 2018).

[248] In terms of s 44.

[249] In terms of s 49B.

The previous subsections 49A(5)[250] and (6)[251] of the Higher Education Act of 1997 were not repeated in the amended section 42. Section 42 of the Higher Education Act of 1997 is a more reasonable and fairer clause, enabling the Minister to issue a directive where the possibility of mismanagement or financial failure exists. Where the institution is not able to comply with the directive, the Minister will be able to appoint an independent assessor or administrator, depending on the circumstances, or take any other steps he/she thinks are appropriate to address the issue. Considering that various universities were placed under administration within a short period in the recent past, there is a distinct need for the Minister to have the power to issue a directive when the circumstances in section 42(1) of the Higher Education Act of 1997 are triggered. Some universities are facing renewed allegations of mismanagement, despite being previously placed under administration.[252] The power assigned to the Minister under section 42 of the Higher Education Act of 1997 is not absolute and should therefore not be perceived as a threat but rather as a tool to assist the Minister where appropriate. These amendments are positive and clarify the position and powers of both the independent assessor as well as the Minister. Although the Higher Education Act of 1997 allows the Minister to place a university under administration, his/her powers are restricted in some ways. It is clear from the considerable number of universities that have either been investigated or have been placed under administration due to poor governance and ineffective institutional management, that there was a need for the amendments as contained in the Higher Education Amendment Act of 2016. Although there

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[250] This section provided that if the Minister appoints an administrator in terms of subsection 4. The administrator must perform all the functions of the Council and an employee of the public higher education institution in question must comply with a directive given by the administrator.

[251] This section provided that the costs associated with the appointment of an administrator shall be for the account of the public higher education institution.

[252] The University of Zululand was placed under administration in 2011. It seems that this university is again faced with allegation of mismanagements. See Fengu Z "No Progress on UniZulu Assessment"2017-07-23 *News24*.

are stakeholders who feel it constitutes a threat to institutional autonomy, there are sound reasons for implementing them as they are aimed at improving governance at public higher education institutions.

(b) The independent assessor and administrator

The Higher Education Act of 1997 confers a legal right on the Minister of Higher Education and Training to seek independent assessment and advice on the condition of a higher education institution when circumstances of mismanagement are present at such an institution.[253] Both the independent assessor and the administrator have essential roles to fulfil with regard to investigations of troubled higher education institutions. Their assessments and subsequent reports will guide the Minister in determining the way forward for that institution. In terms of section 43 of the Higher Education Act of 1997, the CHE must appoint an independent assessment panel consisting of at least three suitable persons.[254]

Section 45 of the Higher Education Act of 1997 specifies the circumstances under which an independent assessor may be appointed.[255] These include the following: where a Council of a public higher education institution has requested such appointment in writing; where circumstances arise at an institution involving financial or other maladministration of a severe nature; where circumstances seriously undermine the effective functioning of the public higher education institution; where the Council of the institution has failed to resolve such circumstances; where the circumstances in section

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[253] Prior to the Higher Education and Training Laws Amendment Act of 2012, an independent assessor was appointed in terms of s 44 of the Higher Education Act of 1997.

[254] These persons must have knowledge and experience of higher education, must not be members of the CHE and must comply with any other requirements determined by the CHE.

[255] This section was amended by s 19 of the Higher Education Amendment Act of 2016.

42(2) of the Higher Education Act of 1997 arise; and where the appointment is in the best interests of the institution.[256]

Section 45A of the Higher Education Act of 1997 describes the investigation procedure that should be followed by the independent assessor.[257] This section was initially introduced in the Higher Education Training and Amendment Act of 2012 and was subsequently amended by the Higher Education Amendment Act of 2016. Section 45A(4) of the Higher Education Act of 1997[258] introduced an important change, as it now makes specific reference to a "…Council member, employee, student or service provider or any other person or representative of an entity with a business or other relationship with the institution", instead of only referring to "…any person.." as contained in the Higher Education Act of 1997.[259] It, therefore, clarifies the concept.

Section 45A(8) of the Higher Education Act of 1997[260] was also amended. In the event of any adverse findings against a person, the independent assessor must give such person notice of the detrimental implication or possible adverse finding, and provide such person with all the relevant documentation and evidence affecting his/her rights, interests or potential interests obtained during the investigations conducted by the independent assessor and afford such person the opportunity to respond in a manner that is expedient under the circumstances. This person must also be

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[256] The previous s 45(a) did not require the Council to request the appointment of an independent assessor in writing. Reference to the circumstances in s 42(2) was newly inserted, and s 45(d) now refers to the best interests of the institution.

[257] Amendment by s 20 of the Higher Education Amendment Act of 2016.

[258] Inserted by s 9 of the Higher Education and Training Amendment Act 23 of 2012.

[259] The reference to "any person" was inserted by s 9 of the Higher Education and Training Laws Amendment Act of 2012 and was very broad.

[260] Inserted by s 9 of the Higher Education and Training Amendment Act 23 of 2012.

afforded the opportunity to be heard by way of giving evidence.[261] Previously, this section, as inserted by the Higher Education and Training Laws Amendment Act of 2012,[262] did not contain such provisions. It only provided that the independent assessor directs any person to submit an affidavit or to appear before the independent assessor to give evidence and to produce any document in his/her possession relating to the investigation. Furthermore, the independent assessor may request an explanation from any person whom he/she reasonably suspects of having information. The amended version, as inserted by the Higher Education Amendment Act of 2016, seems to be fairer towards any person implicated in an investigation, affording this person greater rights, and is therefore welcomed.[263]

Section 45A(9) of the Higher Education Act of 1997[264] stipulates that the independent assessor *must* allow a legal representative or a representative from a trade union of which a person is a member, to assist the implicated person. Previously it only stated that the independent assessor *may* allow a legal representative.[265] The previous version of this section as contained in the Higher Education Amendment and Training Act of 2016, thus only provided therefore that the independent assessor had the discretion whether or not to allow such assistance, and would only allow a legal representative. The amended version contained in the Higher Education Amendment Act of 2016 offers more affordable options to the implicated person and is therefore welcomed.

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[261] Section 33(1) of the Constitution as well as the provisions of the Promotion of Administrative Justice Act 3 of 2000 bears reference. Accordingly, administrative actions must be lawful, reasonable and procedurally fair, and any person whose rights have been adversely affected as the right to be given written reasons for the action taken against him/her.

[262] Inserted by s 9 of the Higher Education and Training Laws Amendment Act of 2012.

[263] Amended by s 20(b) of the Higher Education Amendment Act of 2016.

[264] Amendment by s 9 of the Higher Education and Training Amendment Act 23 of 2012.

[265] Inserted by s 9 of the Higher Education and Training Laws Amendment Act of 2012.

Section 45B, as inserted by the Higher Education and Training Laws Amendment Act of 2012, was also considered a contentious amendment.[266] It stipulated that an independent assessor be competent to enter any building or premises of the institution and to copy any documents on those premises which in his/her opinion had a bearing on the investigation. The higher education stakeholders felt that this endowed the independent assessor with too much power to enter any building or premises and to copy any documents without the Council or management being made aware of what documentation was taken. The amended section 45B of the Higher Education Act of 1997 now states that the independent assessor must provide a signed inventory of any copied documents to the person(s) to whom the custody of the documents is entrusted, thus offering some measure of protection and awareness to the institution.[267] This amendment is also welcomed.

Section 47 of the Higher Education Act of 1997, which provides for the functions of an independent assessor, was substituted by section 10 of the Higher Education Training Laws Amendment Act of 2012, and subsequently amended by the Higher Education Amendment Act of 2016.[268] It states that the independent assessor must conduct an investigation at the higher education institution concerned; report in writing to the Minister on his/her findings of the investigation, together with the reasons on which the findings are based; and suggest in the report appropriate measures, providing the reasons why the measures are needed. The Minister also has the discretion to extend the period in which the independent assessor must conduct his/her investigation and report to the Minister. Furthermore, after receiving the report from the independent assessor, the Minister must provide a copy of the report to the Council within a period of 90 days, table the report before the National Assembly and publish the report in the

[266] Inserted by s 9 of the Higher Education and Training Laws Amendment Act of 2012.

[267] Amended by s 21 of the Higher Education Amendment Act of 2016.

[268] Amended by s 22 of the Higher Education Amendment Act of 2016.

Government Gazette. The 2012 version of this section did not provide the Minister with the discretion to extend the period in which the independent assessor must conduct the investigation and report to the Minister. Furthermore, it also did not stipulate that the Minister should provide a copy of the report to the Council of the institution within a period of 90 days - it only required the Minister to provide the report as soon as practicable. The amended version indicates that the independent assessor must act within a certain time frame, and the Minister must provide the institution with the report within a certain time period.

The Higher Education Act of 1997 did not previously provide for the indemnification of an independent assessor. The Higher Education Amendment Act of 2016 now provides for this in section 49A.[269] Accordingly, the Minister will be liable for any loss or damage suffered by another person which arose from an act or omission of an independent assessor as a claim against the state. However, an independent assessor will only be indemnified if he or she was not guilty of certain conduct.[270] This is a commendable amendment because the independent assessor can exercise his/her function without fear of liability, although he/she may forfeit this indemnity under certain circumstances.

Section 41A of the Higher Education Act of 1997 provides for the appointment of an administrator. Thus, if an audit of the financial records of

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[269] Section 24 of the Higher Education Amendment Act of 2016 substituted s 49A and provided for the indemnification of an independent assessor.

[270] These acts include intentionally exceeded his/her powers; made use of alcohol or drugs; did not act in the course and scope of his/her terms of reference; acted recklessly or intentionally; without prior consultation with the State Attorney, made an admission that was detrimental to the best interests of higher education or failed to comply with or ignored standing instructions, of which he or she was aware or could reasonably have been aware of, which led to the damage or reason for the claim, excluding damage arising from the use of a vehicle for official purposes; and in the case of a loss, damage or claim arising from the use of a vehicle for official purposes, the independent assessor used the vehicle without authorisation; and not possess a valid driver's license or other appropriate license; did not use the vehicle in the interest of higher education; allowed unauthorised persons to handle the vehicle; or deviated materially from the official journey or route without prior authorisation.

a public institution or an investigation by an independent assessor reveals financial or other maladministration of a severe nature or the serious undermining of the effective functioning of an institution, the Minister may, after consultation with the Council of that institution, appoint an administrator to take over the authority of the Council *or* the management of the institution and perform the function relating to governance *or* management of that institution. This section did not provide for the administrator to take over all the functions of the institution.[271] Section 49B was inserted by the Higher Education and Training Laws Amendment Act of 2012.[272] This was one of the controversial amendments that provided cause for concern to the various higher education stakeholders. Section 49B(1) of the Higher Education Act of 1997[273] allowed the Minister to appoint an administrator after consultation with the Council of that institution, to take over the management, governance and administration of that institution under certain circumstances.[274] Many stakeholders felt that it would not be appropriate for one person to take over all of these functions.[275] The Higher Education Amendment Act of 2016 amended section 49B(1) to refer only to

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[271] See the matter of *Minister of Higher Education and Training and other v Mthembu and Others, Council of Central University of Technology, Free State v Minister of Higher Education and training and Others* where the CUT argued that s 41A(1) did not provide for the simultaneous takeover of governance and management functions. The court, however, pointed out that if it was the legislature's intention to keep these functions separate, it would have provided for the appointment of two administrators instead of only one.

[272] Section 11 of the Higher Education and Training Laws Amendment Act of 2016. Section 8 of the Higher Education and Training Laws Amendment Act of 2016 provided that s 41A(1) and (2) be deleted.

[273] Substituted by s 25 of the Higher Education Amendment Act of 2016.

[274] Reference to "or" was removed in this section. These circumstances include an audit of the financial records of a public higher education institution or a report by an independent assessor or any other report or information revealing financial or other maladministration of a serious nature or serious undermining of the effective functioning of the public higher education institution; or if the circumstances contemplated in s 42(4) arise; if the Council of the public higher education institution requests such appointment; of the Council of the public higher education institution is deemed to have resigned as contemplated in s 27(8).

[275] See the submission by the University of Pretoria dated October 2012 27 – 28; and the submission by the Centre for Constitutional Rights "Higher Education and Training Laws Amendment Act Failing the Test."

the appointment of an administrator by the Minister under certain circumstances. Although section 49B(1) of the Higher Education Act of 1997 no longer includes mention of the administrator "…taking over the management, governance and administration of the public higher education institution," the Act still provides for this in section 49F. After reviewing and considering the various independent assessor reports for the institutions that were investigated or placed under administration, it became clear to the author that the amended provisions of the Higher Education Act of 1997 relating to the mandate of the administrator are commendable. The administration process will be used as a last resort by the Minister, but the amendments make it possible for the Minister to appoint an administrator, take over certain functions of a troubled institution, and assist it to become a healthy and well-functioning institution within a certain period of time. In many of these cases by the time that the Minister appoints an administrator, there are already factions within the Council and they are not functioning effectively. If the Council is not functioning properly, it will be unable to execute its duties towards the institution. Thus, there is a definite need for the Higher Education Act of 1997 to provide for the appointment of an administrator.

Section 49B(1A) of the Higher Education Act of 1997 was added, stating that the Minister must, before appointing an administrator, provide notice to the Council of his/her intention to appoint an administrator; provide the Council with the reasons for the appointment; provide the Council with a reasonable opportunity to make written representations and consider the representations made by the Council of the institution concerned. This clause allows the public institution to be heard before the Minister places the institution under administration. This opportunity may affect the decision made by the Minister and was not previously provided to institutions. Section 49F[276] of the Higher Education Act of 1997 clarifies the role and mandate of an administrator, a change that is welcomed. The

[276] As inserted by s 28 of the Higher Education Amendment Act of 2016.

administrator will be responsible for the following: to take over the role, powers, functions and duties of the Council concerned; carry out the role, exercise the powers, perform the functions and execute the duties of the Council concerned to the extent that such role, powers, functions and duties related to governance; take over and execute the management of the public higher education institution concerned; identify and initiate processes and initiatives that restore proper governance and management, and ensure that a new Council for the higher education institution concerned is appointed and constituted in accordance with the institutional statue as soon as practicable. However, section 49F does not give the administrator *carte blanche*: it confirms that the Minister may confine the mandate of the administrator or determine the mandate of the administrator to include only specifics tasks.

Section 49G[277] of the Higher Education Act of 1997 clarifies the process of appointing an administrator upon the resignation of an institution's Council. In such an instance, the Minister must appoint an administrator for a period not exceeding six months to take over the role, powers, functions and duties of the Council and ensure that a new Council is constituted. A public higher education institution cannot function without a Council, and this section clarifies the role of an administrator in the event that the whole Council resigns.

Section 49H[278] of the Higher Education Act of 1997 deals with the termination of an administrator's term of office,[279] while section 49I of the Higher Education Act of 1997 deals with the directive issued by the Minister

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[277] Section 49E, as inserted by s 11 of the Higher Education and Training Laws Amendment Act of 2012, provides that an institution's Council be dissolved once an administrator is appointed.

[278] As inserted by s 28 of the Higher Education and Training Laws Amendment Act of 2016.

[279] These circumstances include when the Council of the institution is constituted; the expiry of the term of the appointment; the resignation or death of the administrator or the removal of the administrator by the Minister.

to Council, duly appointed by the administrator after his/her term of office has terminated.[280] The Minister may issue the latter directive after taking the administrator's report into account. This directive may then be issued to the Council of the public institution concerned in the event that the Minister has reasonable grounds to believe that certain matters relating to the effective functioning of the institution and the execution of its mandate require specific or continued attention of the Council and the management of the institution.

Section 49J of the Higher Education Act of 1997[281] provides for indemnification of the administrator, by making the indemnification provided to the independent assessor in section 49A of the Higher Education Act of 1997 applicable to an administrator. This is also a positive addition, as it means that the administrator will only be indemnified if he or she is not guilty of certain conduct. The Minister will, therefore, take the responsibility in the event of any claims from third parties resulting from the administrator's actions.

It is clear that the changes effected in 2016 provide the Minister with greater power to intervene in the affairs of a public institution. However, the amendments introduced by the Higher Education Amendment Act of 2016 can be considered as a positive development as they do not merely provide the Minister with *carte blanche*: instead, they provide him/ her with a mandate with which he/she must comply before placing a university under administration. Moreover, the Higher Education Act of 2016 provides greater clarity on matters such as the mandate and functions of the independent assessor and the administrator, which matters that had previously given cause for concern to various stakeholders.

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[280] As inserted by s 28 of the Higher Education and Training Laws Amendment Act of 2016.

[281] As inserted by s 28 of the Higher Education and Training Laws Amendment Act of 2016.

3.5 CONCLUSION

This chapter discussed the concepts of institutional autonomy, public accountability, co-operative governance and conditional autonomy in relation to how they affect higher education institutions.[282] It is essential to understand these concepts, how they relate to one another and the fact that complete institutional autonomy has never been promised to public higher education institutions. Complete autonomy will never be possible in higher education as public funding is being used by these institutions, demanding public accountability.

This chapter includes an overview and discussion of some institutions that were placed under administration or investigated between 2008 and 2012. Three of these institutions were discussed in some detail to highlight their governance shortcomings and the need for corporate governance reform in the higher education environment.[283] One of these institutions, the CUT, took the Minister of Higher Education and Training to court to prevent the DHET from appointing an administrator after an investigation was conducted by an independent assessor. In this matter, the CUT was of the view that an administrator could not take over both the Council as well as the management of the institution. However, the court found that it was not the intention of the legislator to appoint two administrators for these two functions. Furthermore, the CUT felt that the DHET's case was procedurally flawed in three ways namely the assessor's report, the consultation process with the Council relating to section 41A(1) of the Higher Education Act of 1997, and the decision to appoint an administrator. In this instance, the court found that the Minister's appointment of an administrator was unlawful, but there was no justification to set aside the

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[282] See para 3.2 above for a discussion on autonomy, public accountability and co-operative governance. This is however not a full discussion as these topics are complex and extensive.

[283] Discussed in para 3.3.2(b) above.

independent assessor's report.[284] This judgement made legal history, as this institution became the first university to take the Minister to court and prevent the appointment of an administrator. The court found in favour of the institution, and it is likely that this judgment gave rise to the amendments contained in the Higher Education and Training Amendment Act of 2012 and the Higher Education Amendment Act of 2016.

Furthermore, this chapter provides a critical overview and discussion of the ministerial interventions contained in both the Higher Education and Training Laws Amendment Act of 2012 and the subsequent Higher Education Amendment Act of 2016. Emphasis was placed on the amendments relating to the improvement of governance[285] and amendments pertaining to ministerial interventions.[286]

Many higher education stakeholders argued that institutional autonomy was threatened by the promulgation of the Higher Education and Training Amendment Act of 2012. Some went as far as to threaten legal action against the DHET. It is suggested that the higher education stakeholders invest the same type of energy into improving governance at public institutions and eliminating mismanagement, fraud and corruption. Considering the findings of the various independent assessors and the continued allegations of inadequate governance practices, mismanagement, fraud and corruption at public institutions, it is clear that more significant efforts are necessary from all stakeholders to address these matters. It seems that stakeholders may be placing too much emphasis on the threat to institutional autonomy and the provision for ministerial interventions. It is clear that these ministerial interventions will

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[284] *Minister of Higher Education and Training and Others v Mthembu and Others, Council of Central University of Technology, Free State v Minister of Higher Education and Training and Others* (2776/2012, 2786/2012) [2012] ZAFSHC 144 (13 August 2012). See the discussion above in para 3.3.2(b).

[285] See para 3.4.2 above for a discussion of these amendments.

[286] See para 3.4.3 above for a discussion of these amendments.

only be used as a last resort by the Minister.[287] It is important to note that although the Minister still has the power to place an institution under administration and dissolve its Council, the Minister is provided with a mandate that needs to be complied with before the institution can be placed under administration. In other words, there are various "layers" contained in the Higher Education Act of 1997, preventing the Minister from placing an institution under administration at the first sign of trouble. The Higher Education Amendment Act of 2016 provides the Minister with greater options than to place an institution under administration immediately. This is more in line with natural justice. Whilst the rules of natural justice, requiring procedural fairness and ensuring that a fair decision is reached by an objective decision-maker based upon logical proof, clearly underpin the amendments, the Minister still has the authority to intervene should it be required. The large number of universities placed under administration between 2005 and 2008[288] indicate that drastic changes were necessary to improve governance practices and curb mismanagement in institutions. Recently, it became known that several universities are facing renewed allegations of maladministration and mismanagement and that most of these institutions have faced

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[287] See for instance the interactions between the Minister and UniZulu as well as MUT. Some of the media reports indicated how long the Minster tried to assist some of the troubled intuitions. See for instance Fengu M "No Progress on UniZulu Assessment" 2017-07-27 *City Press*.). This article published in 2017 reported on the fact that almost a year elapsed after the Minister had advised the troubled Council of UniZulu of his intention to appoint an independent assessor. A year after this article was published, the Minister had still not appointed an independent assessor. As a matter of fact, recently, the Minister issued a directive to the Council of this institution to probe claims of irregular tender processes, irregular staffing and human resource practices and possible financial mismanagement. A series of forensic investigations will be conducted at this institution; see Myeni G "UniZulu Forensic Probe is Long Overdue"2018-06-01 *Zululand Observer.*

[288] See section 3.3.2 above for a discussion of the universities placed under administration. On the rules of natural justice, i.e. the *audi alteram partem* (the right to be heard) and the *nemo judex in parte sua* (no person may judge their own case) rules generally, see generally Taitz J "The application of the *audi alteram partem rule* in South African administrative law" 1982(45) *THRHR* 254 – 273; Corder H "The content of the *audi alteram partem rule* in South African administrative law" 1980(43) *THRHR* 156 – 177; Vermeule A "Contra Nemo ludex in Sua Causa: The Limits of Impartiality" 2012(122) *The Yale Law Journal* 384 – 420; and Hess RU "Nemo Iudex in Sua Causa and the challenge procedure under the Uncitral Model Law" 2018(50) *International Law and Politics* 1431 – 1422.

administration before.[289] Allegations of fraud, corruption and misconduct at the University of Johannesburg (UJ)[290]University of the Western Cape (UWC), emphasises the need for adequate regulation. There is no indication that the DHET is involved in any investigation in these universities, confirming that the Department does, in fact, respect institutional autonomy at public universities. However, the continuing problems in public higher education institutions confirm the need for the Minister to have the power to intervene in the affairs of an institution under certain circumstances such as, for instance, where institutions fail to comply with directives issued by the Minister after repeated allegations of mismanagement, fraud or corruption.

The DHET should act in an advisory capacity and be kept informed of all developments at universities facing allegations of corruption, fraud and mismanagement. The review of both the independent assessors' reports as well as the administrators' reports of the universities that were placed under administration provides proof that higher education institutions require strong leadership. Council must be aware of its mandate and must make decisions in the best interests of the institution; it should also avoid taking on an operational role within the institution. On the other hand, senior management, including the Vice-Chancellor, should take control of the management and operational requirements of the university. It is imperative that all institutions have sound governance policies and procedures in place to ensure effective management of the institution and to curb self-interest and corruption, especially in the awarding of tenders. If the Higher Education Act of 1997 were amended to include a standard of conduct for Council members and senior management, these members

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[289] For instance, UniZulu and MUT see www.pmg.org.za for their presentations to the Portfolio Committee; Fengu "No progress on UniZulu assessment" 2017-07-23 *News24*.Other universities that have also been implicated in continued allegations of fraud are Walter Sisulu University (WSU) and Cape Peninsula University of Technology (CPUT). See Phakathi B "Fraud and Chaos: The Four Universities keeping Government Awake at Night" 2017-11-24 *Business Live*.

[290] See para 3.3.2(a) for a discussion on these allegations.

would arguably be more mindful of their actions. Recommendations in this regard are made in Chapter 6 below.[291]

[291] See Chapter 6, para 6.3.4 below for these recommendations.

CHAPTER 4: SOUTH AFRICAN COMPANY LAW AND CORPORATE GOVERNANCE

4.1 INTRODUCTION AND BACKGROUND

This chapter focuses on the applicable company law and current corporate governance principles as contained in the *King IV Report on Corporate Governance* (*King IV*).[1] Corporate governance principles in respect of higher education institutions as contained in the *2014 Reporting Regulations* are also discussed.[2] In addition, it also considers whether the Higher Education Act of 1997 might be revised to incorporate some of the principles as provided for in the relevant company law as well as corporate governance principles. No in-depth analysis of corporate law is provided, nor is it the intention of this research to suggest that public higher education institutions be incorporated as companies. Instead, possible amendments to improve corporate governance and accountability practices in public higher education institutions are suggested. According to Dlamini:

> … the growing influence of corporate culture in higher education makes universities look like subsidiaries for business enterprises instead of making universities the Bureau of Knowledge Production and Licensing Degrees. Business is about domination and profit-making, which is divorced from the 'ideal university' as education is a public good.[3]

Universities must focus on education and knowledge production. The South African public cannot afford to lose public higher education institutions to stringent and expensive corporate governance practices, driven by ever-

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[1] Published by the Institute of Directors on 1 November 2016. See para 4.4.4 below for a discussion of *King IV*.

[2] See para 4.4.4 below for a discussion on the *2014 Reporting Regulations.*

[3] Dlamini R "Corporatisation of Universities Deepens Inequalities by Ignoring Social Injustices and Restricting Access to Higher Education" 2018 (32) *SAJHE* 56.

increasing demands from shareholders to optimise dividends.[4] Yet, some principles of corporate governance are also fundamentally important to higher education institutions. According to *King IV,* the governing body must continuously practise accountability and transparency. In this instance, the Council of a higher education institution must ensure that it takes on an effective leadership role by adopting *King IV* and determining the direction of following effective corporate governance practices. Not all the principles of *King IV* are applicable to higher education institutions: one example is shareholder activism. The mindful application of *King IV* must be beneficial and conducive to the efficient functioning of a higher education institution. A higher education institution should not become an overregulated and stringent legal environment, which may infringe on academic freedom, thus making it difficult to conduct its business in an effective way.

In the comparative jurisdictions that are discussed later in this chapter, public higher education institutions are structured as corporations.[5] It is not attempted, nor is it possible within the limited scope of this thesis, to provide an in-depth analysis of the relevant aspects of company law as most of these topics are worthy of being research topics on their own. The intention is to draw on the more clearly enunciated principles of company law and corporate governance for guidance on strengthening the governance of higher education institutions in South Africa.

Section 66 of the Companies Act of 2008 provides that the business and affairs of a company must be managed by, or under the direction of its board.[6] The board thus has the authority to exercise all the powers of the

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[4] Dlamini 2018 (32) *SAJHE* 57; Habib A "Transcending the Past and Reimagining the Future of the South African University" 2016 (42) *Journal of Southern African Studies* 45.

[5] See Chapter 5 below for a discussion of these comparative jurisdictions.

[6] Section 66(1) of the Companies Act of 2008; see also Delport PA (ed) *Henochsberg on the Companies Act of 2008* (LexisNexis 2011) 249 – 262.

company and perform any of its functions, except where the Act or the company's memorandum of incorporation states otherwise.[7] This provision endows the board with broader powers than was previously the case, as it is clear that the powers are derived from a statute and not the company's constitution. Furthermore, they extend to both the "business" and "affairs" of the company.[8] Similarly, in terms of section 27(1) of the Higher Education Act of 1997, a Council of a higher education institution must govern the institution; while section 30 confirms that the Principal or Vice-Chancellor of a public higher education institution is responsible for the management and administration of the institution.[9] The board of directors of a company can be compared to a Council of a higher education institution. The chief executive officer holds a similar position to that of a Vice-Chancellor of a higher education institution.

The common law and statutory duties and liabilities of directors are briefly considered in this chapter, with a view to recommending that some of these

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[7] Prior to the Companies Act of 2008, the regulation of director's duties was left largely to common law. The common law duties are those of good faith, honesty and loyalty. In addition, directors must also exercise a duty of care and skill, which is not considered a fiduciary duty. See Cassim F *et al. Contemporary Company Law* (Juta Cape Town 2012) 507; Havenga MK *Fiduciary Duties of Company Directors with specific regard to Corporate Opportunities* (Published LLD thesis University of South Africa 1995) 11; Job CO *Common Law Duties and Section 76 of the Companies Act 71 of 2008 compared* (Published LLM thesis University of Pretoria 2012) 6 – 15. In *Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd* [2014] JOL 32101 (WCC) at para 33 the following was confirmed "'It is necessary to reiterate that the directors of companies are empowered by s 66 of the Act, as well as by their company's articles to manage the company's business, to transact on its behalf and to delegate their powers and functions. They exercise their powers collectively, by majority vote, as a board. In terms of the Act, the ultimate power in a company is now with the board of directors, and not with the shareholders." See in general Yeats JL (ed) *Commentary on the Companies Act of 2008* (Jutatstat online publications 2017) 2-1249 - 1256.

[8] For more on the provisions of s 66 see in general, Havenga 2013 *TSAR* 262.; Cassim *et al.* Contemporary Company Law 480 – 481; Delport *et al. Henochsberg on the Companies Act 71 of 2008* 249 – 253. The Companies Act of 1973 did not have similar provisions and the powers were regulated by the company's Articles of Association, which usually only referred to the "business" of the company.

[9] See Chapter 2, para 2.2 above for a discussion of the higher education landscape in South Africa post-1994.

duties and liabilities be included in the Higher Education Act of 1997.[10] These duties include not only the fiduciary duties of directors[11] but also their duties of care and skill.[12] Director's duties were, for the first time in South African company law, partially codified in the Companies Act of 2008. In addition, this Act provides for a statutory business judgment rule.

The sections, which follow, provide a brief comparison between the duties and liabilities contained in sections 76 and 77 of the Companies Act of 2008 and section 60 of the Banks Act 94 of 1990.[13] The Banks Act of 1990 specifically applies to the regulation and supervision of the business of public companies, namely, banks. The Companies Act of 2008 also applies to banks, as they are companies. The relevant provisions in the Banks Act of 1990 relate to the duties of bank directors, their compliance role and certain corporate governance provisions, which have been included in the Act. The Companies Act of 2008 does not contain similar provisions in respect of compliance or governance, and for that reason, the Banks Act of 1990 may be instructive. De Jager infers that financial institutions are viewed as companies with a higher public impact than that of other companies.[14] Financial institutions are highly regulated, and compliance with various statutory instruments is imperative. Therefore, in the exercise of their duties, directors of banks are held to a higher standard than their counterparts in most other industries.

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[10] See Chapter 6, para 6.3 below for these recommendations. See Chapter 4, para 4.2.4 above for a discussion on the common law fiduciary duties.

[11] See para 4.2.5 below for a discussion of the fiduciary duties.

[12] See para 4.2.6 below for a discussion of the duty of care and skill.

[13] For a comparison with the Banks Act of 1990, see para 4.3 below.

[14] De Jager JJ *The Management of Banks in South Africa: Legal and Governance Principles* (Published LLD thesis Rand Afrikaanse University 2000) 1 - 3.

This chapter also includes a brief overview of the liability of directors,[15] the removal of directors[16] and delinquency provisions[17] in terms of the Companies Act of 2008. These aspects have been included as it may be useful to include similar provisions in the Higher Education Act of 1997.[18]

South African higher education institutions are facing a difficult time as a result of recent developments in the sector.[19] It has been demonstrated that corporate governance practices in higher education institutions are inadequate and require improvement.[20] It is subsequently suggested that the governance framework of higher education institutions should include a partially codified standard of conduct for Council and executive management, as well as a business judgment rule to promote honest conduct by Council and executive management members acting in the best interests of their institutions. It is also suggested that the Higher Education Act of 1997 should provide for the removal of Council members and executive management, as well as having them declared delinquent and providing for their liability in certain circumstances.[21]

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[15] See para 4.2.8 below for a discussion of the liability of directors in terms of the Companies Act of 2008.

[16] See para 4.2.9 below for a discussion of the removal of directors.

[17] See para 4.2.10 below for a discussion of declaring a director delinquent.

[18] See Chapter 6, para 6.3 below for specific recommendations in this regard.

[19] Various universities were placed under administration before and after the attainment of democracy in 1994. Even as recently as May 2018, an independent assessor was appointed for the University of Zululand. See Chapter 3, para 3.3.2(b) above for a discussion of the administration process of some of these institutions.

[20] See Chapter 3 para 3.3 above for a discussion of the ministerial interventions into the affairs of public higher education institutions as well as a discussion regarding the universities that were placed under administration.

[21] Recommendations in this regard are made in Chapter 6.3 below.

4.2 THE COMPANIES ACT OF 2008

4.2.1 Introduction

The Companies Act of 2008 came into effect on 1 May 2011,[22] largely replacing the Companies Act of 1973.[23] The Companies Act of 1973 was outdated and in need of reform to reflect changing business trends and developments.[24]

4.2.2 Types of directors

A company is a juristic entity that exists separately from the company management and shareholders. It can therefore not act on its own behalf, and its board of directors is responsible for managing the affairs of the company.[25] Fiduciary duties are not only owed by directors, but also by

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[22] For more on the company law reform process, see generally, Mongalo TH "An Overview of Company Law Reform in South Africa: From the Guidelines to the Companies Act 2008" 2010 (1) *Acta Juridica* xiii – xxv. The focus here is on fiduciary duties and liabilities in terms of the Companies Act of 2008 to the extent that they may provide guidelines in the higher education sector.

[23] Chadwick N "The South African Companies Act of 1973" 1974 (14) *Zimbabwe Law Journal* 144 – 161.

[24] The Companies Act of 1973 was bulky, complex and excessively technical. Many of the traditional company law doctrines that were inherited from the English law, were either abandoned or modified considerably, and new concepts were developed in the Act of 2008. The Companies Act of 2008 repealed most of the provisions of the 1973 Act, with the exception of Chapter 14 which provides for the liquidation and winding up of companies to a certain extent. See in general, Mongalo 2010 *Acta Juridica* xiii – xxv; Knight P "Keep it Simple and Set it Free: The new Ethos of Corporate Formation" 2010 *Acta Juridica* 3 – 42; Cassim F *The Practitioner's Guide to the Companies Act of 2008* (Juta Cape Town 2015) 2. For more on company reform, see in general Mongalo TH *Modern Company Law for a Competitive South African Economy* (Juta Cape Town 2010) xiii – xxv for more information on the process followed in the corporate law reform which resulted in the promulgation of the Companies Act of 2008. For more on this subject matter, see Locke N "The meaning of 'Solvent' for Purposes of Liquidation in terms of the Companies Act 71 of 2008: *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited*" 2015(27) *SA Merc LJ* 153 – 162.

[25] For more on the juristic personality of companies see generally, Coetzee L "The Fiduciary Relationship between a Company and its Directors" 2014 (35) *Obiter* 286; Pretorius JT *et al. Hahlo's South African Company Law through the cases* 6th ed (Juta Kenwyn 1999) 7. One of the provisions that still has limited application in terms of the transitional arrangements is s 424 of the Companies Act of 1973, which provides for the liability of directors in the event of reckless and fraudulent trading. Sections 22

senior managers, senior employees, prescribed officers and members of an audit committee or board committee.[26] Similarly, duties are not only owed by Council members of a public higher education institution, but also its executive management and those employees who form part of the Council committees.

Executive and non-executive directors are distinguished in company law, although the distinction is not specifically provided for in the Companies Act of 2008.[27] Councils of higher education institutions have similar positions in their internal and external Council members'.[28] A non-executive

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and 77(3)(b) of the Companies Act of 2008 also deal with the issue of fraudulent and reckless trading by directors of a company. Phungula S "Lessons to be Learned from Reckless and Fraudulent Trading by a Company: s 424(1) of the Companies Act of 1973 and s 77(3)(b) of the Companies Act of 2008" 2016 (28) *SA Merc LJ* 238 – 249. The liability of directors is discussed in para 4.2.8 below.

[26] The definition of a "director" in the Companies Act of 2008 is very wide and includes all types of directors such as alternate directors, executive directors, nominee directors, *ex officio* directors as well as shadow directors. According to the definition contained in section 1, a "director" means a member of the board of the company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated. This definition therefore includes people who are not formally appointed to the position but are acting in the position. It also includes persons who may not be regarded as "directors" but have a different title such as "prescribed officer" or "manager", and who are responsible for the management of the affairs of the company. See s 76(1)(a) and (b). This is the case even though the members of these committees are not members of the company's board of directors and do not have any voting rights. See in general, Cassim *Practitioners Guide to the Companies Act of 2008* 64; Mupangavanhu BM *Directors' Standards of Care, Skill, Diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future Implications for Corporate Governance* (Published DPhil thesis University of Cape Town 2016) 21 – 26. A prescribed officer is defined as a person who exercises general executive control over and management of the whole or a significant portion of the business and activities of the company; or regularly participates to a material degree in the exercise of general executive control over and management of the whole or a significant portion of the business and activities of the company. For more on this subject matter, see in general, Idensohn K "The Meaning of 'Prescribed Officers' under the Companies Act of 71 of 2008" 2012 (129) *SALJ* 717 – 735 Cassim *Practitioners Guide to the Companies Act of 2008* 64 – 65; Coetzee L "The Fiduciary Relationship between a Company and its Directors" 2014(35) *Obiter* 296 – 304.

[27] See in general, Cassim *Practitioners Guide to the Companies Act of 2008* 65; Stevens R "The Legal Nature of the Duty of Care and Skill: Contract or Delict?" 2017 (20) *PELJ* 2; Coetzee 2014 *Obiter* 298 – 302.

[28] According to s 27(6) of the Higher Education Act of 1997, at least 60% of the Council members must be external.

director is a person who is a director of the company but is not a full-time employee while an executive director participates in the day-to-day management of the business and is also a full-time employee. A non-executive director is not required to give continuous attention to the affairs of the company.[29] In many instances, non-executive directors plead ignorance when it comes to the effective functioning of boards.[30] The unitary board structure is adhered to in South Africa. Both executive and non-executive directors are equally involved and accountable for the proper functioning of the board.[31] In *Howard v Herrigel NNO,*[32] it was found that different types of directors should not have different types of duties. The court held that the legal rules should be the same for all directors across the board. In the assessment of a director's compliance with his/her duties it should, however, be taken into consideration whether the director is engaged in the management of the affairs of a company on a full-time or part-time basis. In *Howard v Herrigel*, the court found that once a director had taken up office as a director, he/she stood in a fiduciary relationship with the company and was required to act in good faith towards the company.[33] *King IV* favours independent directors as they add value, skills, knowledge and experience that might not otherwise be available to the

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[29] Coetzee 2014 *Obiter* 298; Cassim *et al. Contemporary Company Law* 478 – 480; Cassim *The Practitioner's Guide to the Companies Act of 2008* 64 – 65.

[30] The current corporate failure relating to Steinhoff is a good example. See para 4.4.1 below for a discussion of this corporate failure.

[31] In European countries such as Germany, the Netherlands or Denmark, a two-tier board structure is used. For more on this subject matter see in general Du Plessis JJ "The German Two-Tier Board and the German Corporate Governance Code" 2004 *European Business Law Review* 1139 – 1164; Lessambo FI *The International Corporate Governance System* (Palgrave MacMillan UK 2013) 114 – 115; Block D and Gerstner A "One-tier vs two-tier board structure: A Comparison between the United States and Germany" 2016 *Penn Law Legal Scholarship Repository* 4 – 70.

[32]1991 (2) SA 660 (A) 58. Also see Dorchester Finance Co Ltd Stebbing (1989) BCLC 498 (Ch) (United Kingdom) where it was held in terms of English law that there was no difference in the duties owed by executive and non-executive Directors; Janse van Rensburg JP *A Critical Analysis of a Non-Executive Directors' Responsibility to Register for VAT* (Published MCom thesis North-West University 2016) 13; Van Dorsten JL *Rights, Powers and Duties of Directors* (Obiter Publishers CC 1992) 20; 170.

[33] Havenga 2000 *SA Merc LJ* 34 – 35; Coetzee 2014 *Obiter* 298.

board. They also bring an objective and independent view to the table, which can increase the effectiveness of the board.[34]

Section 27(6) of the Higher Education Act of 1997 stipulates that at least 60% of the Council members must be independent. Council members, whether external or internal, have the same duties and must act in good faith and in the best interests of the institution to ensure good corporate governance and accountability.

4.2.3 Fiduciary obligations and the fiduciary relationship between a director and his/her company

A fiduciary is a person who undertakes to act in the best interests of another.[35] *Philips v Fieldstone Ltd and Another*[36] confirms that the principles that govern the actions of a person who occupies a position of trust towards another were adopted in South Africa from the equitable remedy of English law.[37] A fiduciary relationship requires at least an undertaking by

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[34]Deloitte's "King IV: Independent Directors – Bolder than Ever" file:///C:/Users/corliavdw/Downloads/za_Deloitte_KingIV_Independent_Directors_01032017.pdf (Date of use: 3 February 2018). *King IV* is discussed more fully in para 44.4.3 below. See principle 7 of *King IV*.

[35] For more on fiduciary relationships, see in general Havenga *Fiduciary Duties of Company Directors with specific regard to corporate opportunities* 8; De Jager *The Management of Banks in South Africa: Legal and Governance Principles* 283; Havenga MK "Breach of Director's Fiduciary Duties: Liability on What Basis?" 1996 (8) *SA Merc LJ* 366; Ngaleka VP *A Study of the Impact of Company Legislation on the Fiduciary Duties of Directors with regard to contracts with the Company* (LLM thesis University of Cape Town 2014) 12 – 14. According to Blackman, in Roman-Dutch law the term "fiduciary duty" is regularly used in connection with the management of the affairs of one person by another; see Blackman MS *The Fiduciary Doctrine and its application to Directors of Companies* (Published PhD thesis University of Cape Town 1970) 245; Rahman L *Defining the Concept "Fiduciary Duty" in the South African Law of Trusts* (Unpublished LLM thesis University of Western Cape 2006) 1; *Hofer v Kevitt* No 1996 (2) SA 402 C 407 B; Coetzee 2014 *Obiter* 286– 290.

[36] 2004(3) SA 465 (SCA).

[37] *Philips v Fieldstone and Another* (2004) 1 All 150 SCA at 30. The English doctrine of undue influence is usually associated with the fiduciary relationship; see Blackman *The Fiduciary Doctrine and its application to Directors and Companies* 70. The origin of the doctrine is not important for the purposes of this research. However, safe to say that considering all the academic writing and common law, its existence and importance cannot be denied. For more on the background of the English fiduciary

someone to act in relation to a matter in the interests of another, in a manner, which is understood by both parties.[38] As companies started to evolve, there was an increasing need to be able to seek redress against defaulting directors who were not acting in the best interests of their companies. Commentators have pointed out the *sui geris* nature of a director's fiduciary obligation.[39] A director should be perceived as fiduciary *sui generis,*[40] which means that his/her duty is deemed unique. This is a view that the author shares.[41] Fiduciary duties are imposed on directors for the protection of the company and its shareholders; any breach of fiduciary duty will result in liability for the director.[42] Like directors, Council members should also be held liable for violations of their fiduciary duties.[43]

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relationship, see Hayton D "English Fiduciary Standards and Trust Law" 1999 (32) *Vanderbilt Journal of Transnational Law* 555 – 609; Sealy LS "Fiduciary Relationships" 1962 (69) *Cambridge Law Journal* 69 – 72. For more on the origin of this doctrine, see in general Blackman *The Fiduciary Doctrine and its Application to Directors and Companies* 242 - 243; *Aberdeen Railway Co v Blackie Bros* 1 Macq (1854) HL 461 (United Kingdom) 461; *Baxter v Beningfield* 4 (1896) N.L.R 143 (United Kingdom) 143; *Robinson v Randfontein Estates Gold Mining Company* 1921 AD 168.

[38] Job *Common Law duties and section 76 of the Companies Act 71 of 2008 compared* 7.

[39] Havenga *Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities* 7; Havenga MK "Director's Fiduciary Duties under our future Company Law Regime" 1997 (9) *SA Merc LJ* 310 – 324.

[40] Havenga *Fiduciary Duties of Company Directors with specific Regard to Corporate Opportunities* 8; for more on the fiduciary principle, see p 8 – 11; Fourie JSA "Die Sui Generis Aksie teen Direkteure weens Verbreking van Vertrouenspligte" 1995 (3) *Stellenbosch Law Review* 408 – 416; Havenga 1996(8) *SA Merc LJ* 366 – 367.

[41] Havenga has indicated that there are two requirements to establish a fiduciary relationship: firstly, the fiduciary should be able to exercise some discretion or power, and it must be able to unilaterally exercise that discretion or power in the interest of the beneficiary. Fourie argues that, the *sui generis* action should be treated as a form of liability within the law of delict. Fourie 1995 *Stellenbosch Law Review* 408 – 416; Havenga 1996(8) *SA Merc LJ* 367; Havenga M "Director's Co-liability for Delicts" 2006 (18) *SA Merc LJ* 234; Havenga *Fiduciary Duties of Company Directors with Specific Regard to Corporate opportunities* 10.

[42] Grove AP *Company Directors: Fiduciary Duties and the Duty of Care and Skill* (Published LLM thesis University of Pretoria 2012) 7.

[43] Liability of directors is discussed in para 4.2.8 below.

4.2.4 Common law fiduciary duties in South Africa

Director's common law fiduciary duties are well established in South Africa.[44] Prior to the promulgation of the Companies Act of 2008, the rights and duties of directors were mainly derived from contracts concluded with the company, the Memorandum and Articles of Association, statute(s) and the common law.[45] The common law provided for duties of good faith, honesty and loyalty.[46] The common law also provided for the duty to exercise reasonable care and skill, which is not a fiduciary duty.[47] In common law, once a person accepts an appointment as a director, that person stands in a fiduciary relationship towards that company and is obliged to display good faith towards that company.[48]

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[44] The Companies Act of 1973 did not contain a standard of conduct like the Companies Act of 2008 does. Instead, the common law had to be relied upon when it came to fiduciary duties. See *Robinson v Randfontein Estates Gold Mining Co Ltd 1*921 AD 168, where the court held that "a fiduciary relationship exists where one man stands to another in a position of confidence involving a duty to protect the interests of that other." See Lesofe I *Implication of the Partial Codification of the Director Duties under the new Companies* Act (Published LLM thesis University of Pretoria 2016) 7 – 8. Under the Companies Act of 2008, the common law fiduciary still applies, but it has also been partially codified.

[45] For more on the origin of fiduciary duties in general, see Havenga *Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities* 11 – 22; Bouwman N "An Appraisal of the Modification of the Director's Duty of Care and Skill" 2009 (21) *SA Merc LJ* 509; Grove *Company Directors: Fiduciary Duties and the Duty of Care and Skill* 4.

[46] Partial codification is discussed in para 4.2.5 below.

[47] See in general, Cassim *et al. Contemporary Company Law* 507 for the difference on these duties. However, Du Plessis is of the opinion that there should not be a distinction between fiduciary duties and the duty of care and skill. For more on this opinion see Du Plessis JJ *Maatskappyregtelike Grondslae van die Regsposisie van Direkteure en Besturende Direkteure* (Published LLD thesis Universiteit van die Oranje-Vrystaat 1990) 109; Havenga *Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities* 319 – 321. The distinction between these duties is becoming increasingly blurred.

[48] See in general, De Jager *The Management of Banks in South Africa: Legal and Governance Principles* 283; Ngaleka *A Study of the Impact of Company Legislation on the Fiduciary Duties of Directors with Regard to Contracts with the Company* 12 – 14; *Robinson v Randfontein Estate Gold Mining Co* 1921 AD 177. According to the judgment in *Philips v Fieldstone Ltd and Another* (2004) 1 All 150 SCA at 27, "There is no magic in the term 'fiduciary duty'. The existence of such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship." *Bellairs v Hodnett and another* 1978 (1) SA 1109 (A) at 1130F. See in general *Cyberscene Ltd and Others v i-Kiosk Internet and Information*

The powers provided to directors in terms of section 66 must be exercised, keeping in mind the fiduciary obligations. It is the board of director's duty to manage and monitor employees and to make business decisions.[49] The board of directors, therefore, has the authority to exercise any powers and perform any functions of the company, except where the Memorandum of Incorporation provides otherwise.[50] This differs from the position described in the Companies Act of 1973, which did not provide directors with the power to manage the business of the company. [51]

The Companies Act of 2008 introduced a partial codification of the directors' duties.[52] The existence of fiduciary duties is not dependent on a formal appointment of that director; rather, it commences as soon as the person starts to act in that capacity.[53] A person who accepts a position as

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(Pty) Ltd 2000 (3) SA 806 (C); *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA); Cassim *et al. Contemporary Company Law* 509 – 517.

[49] Ferris 2013 *Without Prejudice* 12 – 13; van Tonder JL A Primer on The Director's Oversight Function as a Standard of Director's Conduct under the Companies Act 71 of 2008" 2018(39) *Obiter* 302 – 305.

[50] Section 66(1). See Cassim *The Practitioner's Guide to the Companies Act 71 of 2008* 63.

[51] For more on this position, see in general Delport PA "Share Issues and Shareholder Protection" 2013 (4) *De Jure* 1056 – 1059; Cassim *The Practitioner's Guide to the Companies Act 71 of 2008* 63; Ferris "Managing a company" 2013 *Without Prejudice* 12 – 13; Mota M "Managing under the Companies Act: 2011 *Without Prejudice* 18 – 19.

[52]A distinction should be drawn between complete codification and partial codification. Partial codification clarifies the law for directors and makes it more accessible. It is, however, not an exhaustive or comprehensive code of fiduciary duties. South Africa, through the partial codification of director's duties, followed international trends as stipulated by the United Kingdom's and other common law jurisdictions. It is clear from the above comparison that partial codification of director's duties within the South African Companies Act of 2008 is more suited than total codification, as directors have a clear guideline of what their duties are, while retaining some flexibility in the use of the common law. See in general s 76(3) of the Companies Act of 2008; Mupangavanhu BM "Fiduciary Duty and Duty of Care under Companies Act 2008: Does South African law insist on the Two Duties being kept Separate?" 2017 *Stellenbosch Law Review* 150 – 152; Cassim *et al. Contemporary Company Law* 507 – 508; Esser and Coetzee J "Codification of Director's Duties" 2004 (12) *Juta Business Law* 30; Van Tonder 2015 (36) *Obiter* 704.

[53] Job *Common Law duties and section 76 of the Companies Act 71 of 2008 Compared* 7; Pretorius *Hahlo's South African Law through the Cases* 279; Coetzee 2014 *Obiter* 287 – 290.

director undertakes the legal responsibility to ensure that as director, they understand the nature of their duties.[54]

4.2.5 Partial codification of directors' duties in terms of the Companies Act of 2008

Section 76 of the Companies Act of 2008 does not exclude the common law. Thus, the common law duties that have not been expressly amended by section 76 of the Companies Act of 2008, or those that are not in conflict with this section, still apply.[55] In terms of the Companies Act of 2008, the fiduciary duties of directors are mandatory, prescriptive and unalterable and apply to all companies.[56] Briefly, they entail that directors should not exceed their powers, and may therefore not act illegally, dishonestly or *ultra vires*[57] the company, nor may they act beyond the powers entrusted to them. It is required from directors, when acting in this capacity, to exercise their powers and perform their duties in good faith, for proper purpose and in the best interest of that company.[58] The management function of directors can be divided into two parts: decision-making and oversight. The decision-making function relates to the consideration of company policy matters and decisions relating to the company future. The oversight function relates to the monitoring and supervision of employees who carry out their functions in the best interest of the company. Both these functions must be done in the best interest of the company. According to van Tonder, a director would have discharged his/her decision-making function if he/she took all reasonable steps to become informed about the company matters.

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[54] Cassim *et al. Contemporary Company Law* 509.

[55] Delport *et al. Henochsberg on the Companies Act 71 of 2008* 290; Yeats *et al. Commentary on the Company Act of 2008* p2- 1277; Van Tonder 2015 (36) *Obiter* 704.

[56] Cassim *et al. Contemporary Company Law* 507.

[57] This means that one is acting beyond one's legal power or authority.

[58] Pretorius *Hahlo's South African Law through the Cases* 279; Grove *Company Directors: Fiduciary duties and the duty of care and skill* 8; Van Tonder *Obiter* 2018 (39) 305.

However, section 76 does not provide for any standards for the discharge of the oversight function.[59] Although directors may delegate management powers to other persons, their obligations in terms of the Companies Act of 2008 as well as the common law remain with them.[60] Apart from their fiduciary duties, directors also have a duty to act with care and skill, which regulates these duties.[61] Yet it should be highlighted that the common law fiduciary duties and the duty of care and skill often overlap.[62] A breach of any of these duties can result in liability of the director in question.[63]

For a director to act *bona fide,* he/she will need to act honestly. This imposes a subjective duty on the director. Objective duties also apply for instance, a director cannot be excused for failing to comply with an objective duty simply because he/she was acting honestly. The objective duty is thus not subservient to the duty of honesty.[64] The objective standards may include the duty of the director to act in the best interests of the company; the duty of the director not to exceed his/her powers;[65] the

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[59] Van Tonder *Obiter* 2018 (39) 305 – 306; s 76(4)(a)(i); van Tonder 2016 (36) *Obiter* 563.

[60] Delport P *New Entrepreneurial Law* (LexisNexis South Africa 2014) 139 – 140.

[61] Van Tonder *Obiter* 2018 (39) 305; van Tonder 2016 (36) *Obiter 563.* This is discussed more fully in para 4.2.6 below.

[62] De Jager *The Management of Banks in South Africa: Legal and governance principles* 288.

[63] Coetzee and van Tonder 2014 *Obiter* 306 – 308.

[64] Grove *Company Directors: Fiduciary duties and the duty of care and skill* 8 – 9.

[65] A director must not act outside of his/her powers i.e. act illegally, dishonestly or *ultra vires* the company.

use of the director's powers for proper purpose;[66] and the director's obligation to exercise his/her independent and unfettered discretion.[67]

(a) Avoiding conflicts of interest, using company information for own benefit and secret profits

The duty to avoid a conflict has been firmly established in the international common law.[68] In the matter of *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC*[69] the two incorporators of Injectaseal CC used to be employees of Sibex Construction. One of them was the managing director, while the other was a general manager. These two employees resigned and started a business, the defendant company in the matter, in direct competition with Sibex Construction. During his last month of employment at Sibex Construction, one of these employees submitted a tender to Sasol and Natref, the main clients of Sibex Constructions. Subsequently, Injectaseal CC sent a letter to Sasol inviting their business. This letter had a price list attached, which prices were lower than those tendered by Sibex

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[66] In *Howard Smith v Ampel Petroleum Ltd* (1974) 1 All ER 1126 (PC) (United Kingdom) it was held that a director's duty to use his/her powers for proper purpose also serves as a test to determine if the act was for the benefit of the company. See Job *Common Law Duties and section 76 of the Companies Act 71 of 2008 Compared* 6 – 16 for a full discussion of these duties; Grove *Company Directors: Fiduciary Duties and the Duty of Care and Skill* 8 – 9.

[67] See generally, *S v Shaban* 1965 (4) SA 646 (W); *Novick v Comair Holdings Ltd* 1979 (2) SA 116 (W*) Fulham Football Club Ltd v Cabra Estates plc* (1994) 1 BCLC 363 (Ch and CA); *Howard v Herrigal* NO 1991 (2) SA 660. A director cannot simply act as a "puppet" for another or simply "rubber stamp" decisions. See Grove *Company Directors: Fiduciary duties and the duty of care and skill* 9; Cilliers HS *Corporate Law* 3rd ed (LexisNexis South Africa) 141 – 147.

[68] See in general, Cilliers HS and Benade ML *Company Law* 4th ed (Butterworths Durban 1982) 327; Cassim *et al. Contemporary Company Law* 534 – 536; *S v Hepker* 1970 (3) SA 702 (W) at 706 where it is stated "that it is clear from law that, in the absence of anything contrary in an agent's mandate, he is obliged to act for the benefit of his principal; hence, if he acts for the benefit of himself or someone else, then even through the act falls within the scope of his mandate, it is nevertheless unauthorised;" see also *Rex v Milne & Erleigh* (7), 1951 (1) SA 791 (A.D) at 828D-E; *North-West Transportation Co Ltd v Beatty* (1887) 12 AC 589 (PC) (Canada) 593–94; Yeats Commentary on the Companies Act of 2008 2 – 1274 – 1275; Van Dorsten *Rights, Powers and Duties of Directors* 192.

[69] 1988 (2) SA 54 (T) at 66D. See in general, Cassim *et al. Contemporary Company Law* 534; Havenga M "Company Directors – fiduciary duties, corporate opportunities and confidential information" 1989 *SA Merc LJ* 122 126.

Construction. Sibex Construction then approached the court to interdict Injectaseal CC from benefiting from their quotation to Sasol. The court ordered Injectaseal CC to withdraw any quotation or tender to either Sasol or Natref pending the determination of the court of granting a final interdict. It was clear to the court that both these employees used the knowledge that they gained while acting as agents for Sibex Construction to the advance of Injectaseal CC. The court granted the interdict in favour of Sibex Construction. This judgment confirmed that fiduciary duties are not restricted to company directors only, but are also extended to any company official acting on behalf of the company.[70] The common law principle relating to the duty to avoid a conflict of interest is influenced by the case of *Keech v Sanford*.[71] As fiduciaries of the company, directors have a duty to avoid a conflict of interest between their companies and their own personal interest. Directors may not, without the informed consent of their board, use information that has come to their attention during the course and scope of their duties as a director to make a profit or retain a profit that was made by them. According to Cassim, the duty to avoid a conflict is the core duty of a fiduciary.[72] Van Dorsten states that the basic duty to avoid a

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[70] Pretorius JT *et al. Student Case Book on Business Entities* 3rd ed (Juta and Company 2004) 101 – 103; Havenga MK "Company Directors – fiduciary duties, corporate opportunities and confidential information" 1989 *SA Merc LJ* 122 – 131. The court confirmed the statement made by the court in *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 (SCC)as follows: "Persons in positions of trusts may be less tempted to place themselves in a position where duty conflicts with interest if the courts recognised and enforced the strict ethic in this area of law."

[71] *Keech v Sanford* (1726) Sel Cas Ch (United Kingdom) 6. See Cassim *et al. Contemporary Company Law* 534. In this case it was held that a trustee should not be allowed to make a profit out of a trust by renewing a lease for his own benefit; see in general Lucas AR "Municipal Councillors - Disqualification for Interest - Application of the Rule in Keech v. Sanford - *R. ex rel Anderson v. Hawrelak*; *Starr v. City of Calgary*" 111 1966 – 1967 *Alberta Law Review* 331 – 332.

[72] See *Imageview Management Ltd v Jack* (2009) BCLC 725 at 739 (CA) (United Kingdom). See furthermore the case of *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* (1988) (2) SA 54 (T) at 66 D, where the court referred to the judgment in the case of *Canadian Aero Service Ltd v O'Malley* (1974) 40 DLR (3d) 371 (SCC) (Canada) and highlighted the following: "an examination of the case law in this court and in the courts of other jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of law. Persons in positions of trust may be less tempted to place themselves in a position where duty conflicts with interest if the courts recognised and enforced the strict ethic in this area of the law."

conflict of interest in terms of the common law provides for various other duties, *inter alia,* the duty to act *bona fide* in the interest of the company; the duty to account for profits; the duty not to misappropriate opportunities proposed to or pursed by the company; the duty not to compete improperly with the company; and the duty to disclose an interest in contracts with the company.[73]

Section 75 of the Companies Act of 2008 governs the declaration of personal financial interests of directors.[74] Accordingly, a director who has a personal financial interest in respect of a matter to be considered by the board, or who knows that a related person[75] has such an interest in the matter, he/she must disclose the interest and its general nature before the meeting considers the matter and must also disclose any material information known to that director.[76] A director who, after the company has approved it, acquires a personal financial interest in an agreement or other

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See Cassim *et al. Contemporary Company Law* 534; Van Dorsten *Rights, Powers and Duties of Directors* 192 – 193.

[73] Van Dorsten *Rights, Powers and Duties of Directors* 192 – 193. Section 238 of the Companies Act of 1973 provided for a duty of a director to disclose interests in contracts. See in general, Kunst JA, Delport PA and Vorster Q (eds) *et al. Henochsberg on the Companies Act of 1973* (LexisNexis online publications 1994) 444 – 449.

[74] "Personal financial interest" is defined in the Companies Act of 2008 to mean (a) a direct material interest of that person of a financial, monetary or economic nature or to which a monetary value may be attributed; but (b) does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act of 2005, unless that person has direct control over the investment decisions of that fund or investment. See in general Delport *et al. Henochsberg on the Companies Act of 2008* 292; *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited (*12476/2015) [2015] ZAWCH 113; 2015 (6) SA 338 (WCC).

[75] "Related person" is defined in s 2 of the Companies Act of 2008 as follows: "an individual is related to another individual if they are married, or live together in a relationship similar to a marriage; or are separated by no more than two degrees of natural or adopted consanguinity or affinity."

[76] See in general, Havenga MK and Locke N *Monograph Corporations and Partnerships (South Africa) in International Encyclopedia of Laws* (Wolters Kluwer International BV, Netherlands 2013) 84; Cassim R "Post-Resignation Duties of Directors: The Application of the Fiduciary Duty not to Misappropriate Corporate Opportunities" 2008 (125) *SALJ* 731 – 753 for more on corporate opportunities and the resignation of directors; Wiese T *Corporate Governance in South Africa with International Comparisons* 2nd ed (Juta Cape Town 2017) 73 – 76.

matter in which the company has a material interest, or who knows that a related person has acquired such an interest in the matter, must promptly disclose the nature and extent of that interest and the material circumstances relating to his/her acquisition to the board of directors or the shareholders.[77] A director may not attend the meeting after he/she has made full disclosure and may not participate in the meeting. The director also may not execute any document on behalf of the company in relation to this matter.[78] A decision by the board or a transaction or agreement approved by the board in the circumstances as described above, is valid despite any personal financial interest by a director or related person if it was approved following disclosure; or whether it was approved without a disclosure but then subsequently ratified by an ordinary resolution after disclosure or it has been declared valid by a court.

Non-disclosure of personal financial interest may in certain circumstances amount to fraud and subsequently, criminal liability.[79] In accordance with section 75(2) of the Companies Act of 2008, the duty to disclose does not apply if the decision may generally affect all of the directors of the company in their capacity as directors; in respect of decisions generally affecting a class of persons of which the director is a member unless the only members of that class are the director or persons related to the director; and if a person holds all the beneficial interest of all the issued securities of the company and is the only director of the company.[80]

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[77] Section 75(6); see Havenga and Locke *Monograph Corporations and Partnerships (South Africa) in International Encyclopedia of Laws* 85; Wiese *Corporate Governance in South Africa: With International Comparisons* 68 – 76.

[78] Havenga 2013 *TSAR* 264.

[79] Section 75(7); see para 4.2.8. See in general, Havenga and Locke *Monograph Corporations and Partnerships (South Africa) in International Encyclopedia of Laws* 85.

[80] Wiese *Corporate Governance in South Africa: With International Comparisons* 73 – 76; Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (LexisNexis South Africa 2016) 215 – 217.

Section 75 is limited to matters of a financial, monetary or economic nature, and this could prove to be problematic as a conflict of interest can arise for reasons that are unrelated to the aforementioned.[81] The Higher Education Act of 1997[82] makes provision for the declaration of both personal and financial interests by Council members. The Principal, Vice-Principals and academic employees declare any interests including any business, commercial or financial activities undertaken for financial or other gain that may raise a conflict or a possible conflict of interest with the public higher education institution concerned. According to section 34(5) of the Higher Education Act of 1997, an employee may not conduct business directly or indirectly with the public higher education institution where a conflict of interest has been identified. Section 34(6) and (7) of the Higher Education Act of 1997 also refers to relatives of employees and the possible direct or indirect conflict of interest that might arise from contracting or procuring services or contracts with them. The Higher Education Amendment Act of 2016 specifically includes reference to "fiduciary or other interest," in these subsections.

Section 76(2)(a) and (b) must be read together with section 75.[83] In terms of section 76(2), directors may not use information that has come to their attention as directors of the company for their personal advantage, and should avoid a conflict of interest (the no-conflict rule); and they have a duty not to make a profit from their fiduciary position as director (the no-profit rule).[84] Although these two principles are separate from each other,

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[81] Steyn C and Everingham G *The New Companies Act Unlocked* (Siber Ink 2010) 248; Wiese *Corporate Governance in South Africa: With International Comparisons* 73 – 76.

[82] Section 27 of the Higher Education Act of 1997.

[83] Section 75 relates to the disclosure of personal financial interest. Delport *et al.* (ed) *Henochsberg on the Companies Act 71 of 2008* 287; Yeats *et al. Commentary on the Companies Act of 2008* p2-1274 – 1276;

[84] See Ndebele I *"No Conflict" Duty of Company Directors* (Published LLM thesis University of Pretoria 2014) 1 – 41 for a discussion of the no-conflict rule; Cassim 2008 *SALJ* 732 – 733; Cassim *et al. Contemporary Company Law* 549 – 554; Delport *et al.* (ed) *Henochsberg on the Companies Act 71 of 2008* 290(8); Lesofe *Implication of*

they are still closely related. Further to this, directors may not use any information that came to their attention to cause harm to the company or any subsidiary of the company[85] knowingly[86].

Robinson v Randfontein Estates Gold Mining Co Ltd[87] is a good example of a director whose interests conflict with those of the company.[88] In this case

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the Partial Codification of the Director Duties under the new Companies Act ; Yeats *et al. Commentary on the Companies Act of 2008* p2 – 1278 – 1279.

[85] This also refer to corporate opportunities. See Cassim *et al. Contemporary Company Law* 535, 550. These sections are a further deterrent for directors not to use their positions as directors for personal gain. See in general, Pretorius *Hahlo's South African Law through the Cases* 303; *Cooks v Deeks* (1916) 1 AC 554 (PC) (Canada); *Regal (Hastings) Ltd v Gulliver* (1942) 1 All ER 378; (1967) 2 AC 134 (HL) (United Kingdom); *Industrial Development Consultants Ltd v Cooley* (1972) 1 WLR 443; (1972) 2 All ER 162 (United Kingdom); *Canadian Aero Service Ltd v O'Malley* (1974) 40 DLR (3d) 371 (SCC) (Canada); Cilliers *Corporate Law* 142.

[86] Section 1 of the Companies Act of 2008 defines "knowing", "knowingly" or "knows" when used with respect to a person and in relation to a particular matter, to mean that the person either had actual knowledge of that matter; was in a position where the person reasonable ought to have (i) had actual knowledge; (ii) investigated the matter to an extent that would have provided the person with actual knowledge; or (iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter. According to Garner BA *Black's Law Dictionary* 10th ed (Thomson Reuters United States 2014) 1003, "knowingly" is defined as: "in such a manner that the actor engaged in prohibited conduct with the knowledge that the social harm that the law was designed to prevent was practically certain to result deliberately." See Levenstein E "The Personal Liability of Directors" 2011 *Without Prejudice* 22; Blackman *et al. Commentary on the Companies Act of 1973* on s 424 of the Companies Act of 1973 521 – 554; Esser IM and Havenga MK (eds) *et al. Corporate Governance Annual Review 2012* (LexisNexis South Africa 2012) 135.

[87] 1921 AD 168. See in general, Havenga *Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities* 361 – 362 who argues that this matter was not strictly a case of the appropriation of a corporate opportunity, but an application of the no profit rule. See also, Havenga *Directors' Fiduciary Duties of company Directors with specific regard to corporate opportunities* 317; Pretorius *Hahlo's South African Law through the Cases* 305; Coetzee 2014 (35) *Obiter* 287 – 288; Job *Common Law Duties and Section 76 of the Companies Act, 71 of 2008 Compared* 13; Legodi PK *Director's Fiduciary Duty to Account for Corporate opportunities* (Published thesis University of Limpopo 2010) 21 -24; Blackman *et al. Commentary on the Companies Act* on s 424 of the Companies Act of 1973 290(8). See Davis D *et al. Companies and other Business Structures* 3rd ed (Oxford Press Cape Town 2013) 121; *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* 2005 (5) SA 550 (SCA) at 562 where the court referred to the situation where a director makes a profit through a breach of his fiduciary duties to the company. In these circumstances a director will not be able to retain such benefit; Esser IM *Recognition of Various Stakeholder Interests in Company Management"* (Published LLD thesis University of South Africa 2008) 208; Ndebele *'No Conflict' Duty of Company Directors* 14- 20.

[88] See in general Havenga *Director's Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities* 317; Pretorius *Hahlo's South African Law*

the court confirmed that "where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty."[89] *Volvo v Yssel*[90] relies on the finding in *Robinson v Randfontein*. In *Volvo v Yssel*[91] Volvo sued Yssel for breach of his fiduciary duty that they alleged he owed to Volvo. Yssel disputed that he owed the company a fiduciary duty since he was not in their direct employ since he worked for a labour brokerage firm. Yssel made a secret profit by not disclosing commission he was earning when he facilitated for other staff members to be transferred to the same labour brokerage firm he was working at. Neither Volvo nor the other employees were aware of the substantial commission Yssel were earning.[92] The court a quo dismissed the claim, but the subsequent appeal was successful. The court found that Yssel was in a position of trust and should, therefore, have acted in the best interest of Volvo and not in self-interest.[93] In *Volvo v Yssel*

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through the Cases 305; Coetzee 2014 (35) *Obiter* 287 – 288; Job *Common Law Duties and Section 76 of the Companies Act, 71 of 2008 Compared* 13; Legodi *Director's Fiduciary Duty to Account for Corporate Opportunities* 21 -24; Blackman *et al. Commentary on the Companies Act* on s 424 of the Companies Act of 1973 290(8). See also, Davis *et al. Companies and other Business Structures* 121; *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* 2005 (5) SA 550 (SCA) at 562 where the court referred to the situation where a director makes a profit through a breach of his/her fiduciary duties to the company. In these circumstances a director will not be able to retain such benefit; Esser *Recognition of Various Stakeholder Interests in Company Management"* 208; Ndebele *'No Conflict' Duty of Company Directors* 14- 20.

[89] Havenga argues that this matter was not strictly a case of the appropriation of a corporate opportunity, but an application of the no profit rule, see Havenga *Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities* 362 for the difference between the no profit rule and a secret profit, p 359.

[90] (247/08)[2009] ZASCA 82. For a discussion of this matter, see Van Jaarsveld M "Annual Survey of Labour Law" 2009 (1).

[91] (247/08)[2009] ZASCA 82.

[92] *Volvo v Yssel* (247/08)[2009] ZASCA para 3 – 12; for more on this case, see Roodt Inc "A director or any other company officer who owes it a fiduciary duty is not permitted to make a profit from his position without the company's consent" http://www.roodtinc.com/archive/newsletter104.asp (Date of use: 3 February 2018); Dharmaratne K "A Consideration whether Directors should Stand in a Fiduciary Relationship with the Company's Related and Inter-related Companies" 5 -7 http://www.cgblaw.co.za/fiduciary-relationship.pdf (Date of use: 3 February 2018).

[93] *Volvo v Yssel* (247/08)[2009] ZASCA para 19 -20.

the court relied on the judgment in *Phillips v Fieldstone Africa (Pty) Ltd,*[94] which provides an excellent summary of the position in South Africa pertaining to fiduciary obligations as follows: "Where one man stands to another in a position of confidence involving a duty to protect the interest of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflicts with this duty……."[95]

In *Dorbyl Ltd v Vorster*[96] the plaintiff company claimed the secret profits made in a transaction from the defendant who was an executive director of the plaintiff company at the time when this secret profit was made. The defendant claimed that the benefits he received could not have been perceived as being corporate opportunities for the company that he was a director of. The court disagreed and found that he was in a fiduciary relationship with his company and that he had breached his fiduciary duty owed to the company when he failed to inform the company of the offer made to him.[97] In *Regal (Hastings) Ltd v Gulliver*[98] the court confirmed that it takes a conflict of interest seriously. Regal operated a cinema in London. Gulliver, one of the directors of Regal proposed that they buy two more cinemas. This was however declined by the other directors. Gulliver together with some of the other directors resigned from Gulliver and

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[94] *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA). See Botha MM "The Role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective" 2009 (30) *Obiter* 708.

[95] Davis *et al. Companies and other Business Structures in South Africa* 24; Havenga MK "Appropriation of Corporate Opportunities by Directors and Employees*: Phillips v Fieldstone (Pty) Ltd* 2004 3 SA 465 (SCA; 2004 1 All SA 15 (SCA)" 2007 2007 *TSAR* 169 – 178.

[96] *Dorbyl Ltd v Vorster* 2011 (5) SA 575 (GSI). See Delport *et al.* (ed) *Henochsberg on the Companies Act 71 of 2008* 293.

[97] Davis *et al. Companies and other Business Structures* 122; Havenga 2013 *TSAR* 257 – 268; Havenga *Directors' Fiduciary Duties and Corporate Opportunities* 345 – 350.

[98] *Regal (Hastings) Ltd v Gulliver* (1942) 1 All ER 378; (1967) 2 AC 134 (HL) (United Kingdom) 1; see in general Prentice DD "*Regal (Hastings) v Gulliver*: The Canadian Experience" 1976 (30) *The Modern Law Review* 450 – 455.

opened a rival company who then bought these cinemas and operated them successfully. The new directors of Regal bought a claim against Gulliver and the other former directors to account for the profit they made. They argued that Gulliver and the other former directors used an opportunity that they became aware of while they were still directors of Regal to advance their own interests. It was Gulliver and the other defendants defence that Regal had declined the opportunity in the first place and therefore they did nothing wrong. The court however found that despite the fact that Regal declined the opportunity, Gulliver and the other defendants still used an opportunity that they became aware of during their directorship at Regal to their own benefit. Accordingly, Gulliver and the other defendants had to account for the profit they made from this opportunity.[99] In *Kensal Rise Investments (Pty) Ltd v Marcus William Marchant*,[100] the court found that the defendant had advanced his own interests by making a profit to the detriment of the plaintiff company and found in favour of the plaintiff. In this matter, it was common cause that, as director, the defendant was in a fiduciary relationship with the company. Furthermore, the plaintiff company pleaded that the defendant also owed a fiduciary duty to the company not to allow his personal interests to conflict with the interests of the plaintiff.[101] The matter relates to a contract of sale of the defendant's equity interest in four companies, together with this loan claims against two additional companies. The defendant was also a director of one of the companies which was subject to the sale mentioned above. He knowingly misrepresented the financial status of this company to the plaintiff company. The company alleged that the contract was voidable because of the defendant's breach of the fiduciary duty. The court agreed and voided the agreement and ordered repayment of AUS

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[99] For a discussion of this case, see in general, Cassim *et al. Contemporary Company Law* 553.

[100] (1523/2013) [2014] ZAKZDHC 47.

[101]The plaintiff company alleged breach of ss 76(2)(a)(i) and (ii*); Kensal Rise Investments (Pty) Limited v Marchant* (1523/2013) [2014] ZAKZDHC para 7(7)(e) – (g).

$850 000.[102] In *Kruger Investments Group Limited and Another v Nuberry Holdings Limited and Others*, the court confirmed that the remedies of fiduciaries who breach their fiduciary duties are essentially similar, whether they be company directors, employees or agents.[103] The court confirmed a rule *nisi* obtained against the first respondent company (Nuberry) in respect of the acquisition by the fourth respondent, a director of both applicant companies, for his own benefit, of corporate opportunities regarding the purchase and transfer of shares and loan claims in two of the respondent companies. The applicants had developed business relationships with these two companies for some years. The court confirmed that in such situations, the fiduciary is deemed to have acquired the property on behalf of the beneficiary of the fiduciary relationship, and that the fiduciary has an obligation to account for the property or obligation so acquired. It was further confirmed that the principle only provides a cause of action and that the property does not automatically become the property of the company.[104] The principles enunciated above also apply in respect of Council members as well as executive management who should not exploit opportunities earmarked for their university for their own personal gain. Recently, it became known that the Chair of Council of the University of Johannesburg as well as one of the senior executives, exploited corporate opportunities in the university's commercial domain for their own benefit.[105] Further to this, some of the independent assessors' reports of the universities that were placed under administration indicated apparent breaches of fiduciary duties

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[102] *Kensal Rise Investments (Pty) Limited v Marchant (1523/2013) [2014] ZAKZDHC para 43; see also Kruger Investments Group Limited and Another v Nuberry Holdings Limited and Others* (14184/15) [2015] ZAWCHC; Delport (ed) *Henochsberg on the Companies Act of 2008* 297.

[103] (14184/15) [2015] ZAWCHC para. 36.

[104] *Kruger Investments Group Limited and Another v Nuberry Holdings Limited and Others* (14184/15) [2015] ZAWCHC para 37-41; 51. The court's use of the "constructive trust" analogy, is in the author's view, unfortunate as a fiduciary is not recognised as a trustee in South African law.

[105] Seale L "High ranking UJ Leaders Accused of Swindling R25m" *Sunday Independent* (date published: 30 July 2017; Seale L "Senior Managers Accused of Swindling UJ Face the Axe" 2017-09-24. *Sunday Independent*.

in the actions of both Council members as well as executive management.[106] Council members owe common law fiduciary duties and a duty of care and skill to their institutions. However, it is unclear whether all Council members are aware of these duties and can be held personally liable in the event of a breach of these duties. In many instances, Council members and the executive management are under the impression that they are acting in the best interests of the university when executing their duties, when in fact they are using information that they gained for their own personal benefit. It is therefore essential that the Higher Education Act of 1997 should be amended to provide a standard of conduct for Council members and executive management to ensure both clarity and accountability. Personal liability is not expressly provided for in the Higher Education Act of 1997. In addition, the DHET do not verify compliance of each public higher education institution against the *2014 Reporting Regulations*. Furthermore, the 2014 Reporting Regulations still refer to *King III*, and have not been updated to comply with the provisions of *King IV*. The King Code of Corporate Governance are a voluntary code, thereby making a strong argument that personal liability should be provided for in the Higher Education Act of 1997.

Section 76(2)(b), of the Companies Act of 2008 underlines the important common law principle that directors are the custodians of corporate information.[107] This section places a compulsory duty on a director to provide the board at the earliest opportunity with any information that came to his/her attention unless that director believes that the information is irrelevant, already available or known to the public and/or other directors.[108]

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[106] See Chapter 3, para 3.3.2(b) above for a discussion of the universities that were placed under administration and more specifically the discussion of the independent assessors' reports.

[107] Ndebele *'No Conflict' Duty of Company Directors* 2014 14- 20; Yeats *et al. Commentary on the Companies Act of 2008* p2 – 1278 – 1279: Delport *et al. (ed) Henochsberg on the Companies Act 71 of 2008* 297 – 298.

[108]Cassim *et al. Contemporary Company Law* 553 – 554; Delport *et al.* (ed) *Henochsberg on the Companies Act 71 of 2008* 295; Yeats *et al. Commentary on the Companies Act of 2008* p2-1279.

It is important to note that in recent times, public higher education institutions have become increasingly more involved in commercial activities for the purposes of producing third stream income. Council members and members of executive management should not use any information that comes to their attention for their own benefit, and they should at all times declare any interest they might have in the form of directorship or shares in external companies. The recent matter of the University of Johannesburg proves the need for the Department of Higher Education and Training to require universities to report on the interest they hold in any commercial companies.[109]

(b) The duty to act in good faith and in the best interest of the company

The duty of good faith is provided for in the common law and now partially codified in section 76 of the Companies Act of 2008. This section provides that a director of a company when acting in that capacity, must exercise the powers and perform the functions of director in good faith for a proper purpose and in the best interests of the company. Henochsberg reasons that the codification of director's duties will provide clear guidelines for directors, as they will be able to identify the scope of their duties. The codification will save directors time, effort and money in complying with the law, as there would be clear guidelines as to how directors should act.[110]

The duty of care and skill regulates the performance of these duties by directors.[111] Good faith depends on honesty, which requires a subjective

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[109] See Chapter 6, para 6.4.2 below for recommendations in this regard; see also Chapter 3, para 3.4.2(a) above for a discussion on these allegations.

[110] Delport *Henochsberg on the Companies Act of 2008* 298(1).

[111] Section 76(a) and (b) of the Companies Act of 2008. Van Tonder 2015(36) *Obiter* 705 – 706. In the matter of *Da Silva and others v CH Chemicals (Pty),* it was found that "it is a well-established rule of common law that directors have a fiduciary duty to exercise their powers in good faith and in the best interest of the company." In the English case of *Shuttleworth v Cox* (1926) 2 KB 9 (United Kingdom) the court

element. It is a well-known principle that directors must exercise their powers bona fide in what they, and not the court, believe to be in the best interests of the company.[112] A fiduciary duty can also be breached in circumstances where the director was acting honestly. Mere incompetence of a director is not necessarily a breach of the fiduciary duty.[113] It is an inevitable part of the duty of good faith that a director must exercise independent judgement in their decisions and must also act within his/her limits of scope of authority.[114] The courts, however, found that there were limits to the subjective test.[115]

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emphasised that the test will lie with whether a reasonable man would have regarded the actions of the directors to have been in the best interest of the company, see in general Grove *Company Directors: Fiduciary duties and the duty of care and skill* 27. In a more recent case, *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC), the court found that the board did act in the best interest of the company when they refused a transfer of shares which they believed not to be in the best interest of the company and the court agreed. For more on the latter case, see in general See Swart C and Lombard M "Vonnisbespreking: Statutêre Aandeelhouers Beskerming – die Reregtelike Beoordeling van Onderdrukkende en Onredelike Benadeelende Direksiebesluite" 2015 (12) *LitNetAkademies* 387 – 397; Delport (ed) *et al. Henochsberg Commentary on the Companies Act 2008* 294; Le Roux P and Mason J "The 'Rocky' Road has been paved, or has it? Directors' Right to Refuse Transfer of Shares: *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC)" 2014 *De Rebus* 40 – 41; Mupangavanhu BM "The Lawfulness of a Memorandum of Incorporation clause that permits a Company Board to Refuse Transfer of Shares without Reasons: Analysis of *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus Pty) Ltd*" 2017 (31) *Speculum Juris* 191 – 204 for a discussion of this case. Section 163 of the Companies Act of 2008 allows a shareholder to apply to court for relief if an act of the company has had a result that is unfairly prejudicial to it. See in general Le Roux and Mardon 2014 *De Rebus* 40; *Omar v Inhouse Venue Technical Management (Pty) Limited and Others* (14227/2014) [2015] ZAWCHC 10; 2015 (3) SA 146 (WCC); *Pakade N.O. and Others v Lukhanji Leisure (Pty) Ltd and Others* (3390/2016) [2017] ZAECGHC. Le Roux and Mardon 2014 *De Rebus* 41.

[112] See *Re Smith & Fawcett Ltd* (1942) Ch 304 at 306; Cassim *et al. Contemporary Company Law* 523 – 524.

[113] See in general Cassim *et al. Contemporary Company Law* 514, 524; *Mills v Mills* (1938) 60 CLR 150 (Australia) and *Howard Smith v Ampel Petroleum Ltd* (1974) 1 All ER 1126 (PC) (United Kingdom); See Lesofe *Implication of the partial codification of the Director duties under the new Companies Act* 16 -18; Job *Common Law Duties and Section 76 of the Companies Act, 71 of 2008 compared* 21 – 22; Grove *Company Directors: Fiduciary Duties and the Duty of Care and Skill* 23 – 32; Delport (ed) *et al. Henochsberg Commentary on the Companies Act 2008* 294 – 298; Mupangavanhu 2017 *Stellenbosch Law Review* 150 – 152.

[114] Cassim *et al. Contemporary Company Law* 514; 524.

[115] In *Shuttleworth v Cox* (1926) 2 KB 9 (United Kingdom) the court stated that the test will be whether a reasonable man would have regarded the act of the director's to be in the best interests of the company. This was also confirmed in *Teck Corp Ltd v Millar*

Section 76(3)(b) of the Companies Act of 2008 codifies the common law principle that a director must act in the best interests of the company he/she is a director of. The provision makes it clear that the duty is owed to the company. As stated by Cassim, there is, in common law, "....copious authority for the view that the word 'company' in this context refers not to the legal entity itself, but rather to the interests of the collective body of present and future shareholders".[116] As already stated above, the higher education environment will benefit from codifying these common law duties so that they are clear to Council members and members of executive management.

4.2.6 The duty of care, skill and diligence

The Companies Act of 2008 also provides for a partial codification of the duty of care, skill and diligence,[117] which is also provided for in common law. In addition to the fiduciary duties owed by directors as discussed above,[118] they also owe a duty of care and skill to the company.[119] In general, directors will be liable for negligence in the performance of their

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(1972) DLR (Canada) that there must, however, be reasonable grounds for the director's belief that they were acting in the best interest of the company. See generally, *Cassim et al. Contemporary Company Law* 524; Lesofe *Implications of the Partial Codification of the Directors' Duties under the new Companies Act* 16 – 17.

[116] Cassim *et al. Contemporary Company Law* 515; see also Havenga 2013 *TSAR* 257; Mupangavanhu 2017 *Stellenbosch Law Review* 150 – 152; Van Tonder 2015(36) *Obiter* 712 – 720; Esser *Recognition of Various Stakeholder interests in Company Management* 211. The stakeholder debate is not discussed here.

[117] According to Garner *Black's Law Dictionary* 5552 – 553, diligence is defined as the "constant application to one's business or duty; persevering effort to accomplish something undertaken. The attention and care required from a person in a given situation, care, heedfulness." See also Van Tonder 2018 (39*) Obiter* 306.

[118] These fiduciary duties are discussed in para 4.2.5 above.

[119] For more on the common law duty of care and skill in general, see Bekink M "An Historical Overview of the Director's Duty of Care and Skill: From the Nineteenth Century to the Companies Bill of 2007" 2008 (20) *SA Merc LJ* 95 – 116; Kennedy-Good S and Coetzee L "The Business Judgment Rule (Part 2)" 2006 (27) *Obiter* 279 – 283; Cassim *et al. Contemporary Company Law* 554 – 561; Mupangavanhu 2017 *Stellenbosch LR* 148 – 152; Esser IM and Delport P "The Duty of Care, Skill and Diligence: the King Report and the 2008 Companies Act" 2011 (74) *THRHR* 452 – 454.

duties. The extent to which directors may be held liable may vary. A breach of a duty of care and skill is dealt with in accordance with the law of delict.[120] In general, the law of delict determines the circumstances in which a person is obliged to bear the damage he/she has caused another.[121] The courts had a more lenient approach by applying a subjective test to determine a directors' negligence, which is based on the skill, experience and the ability of a specific director as influenced by the decision in *Re Brazilian Rubber Plantations & Estates Ltd*.[122] However, the test for a director's breach of duty of care and skill has been challenged in recent years. Du Plessis points out that since the decision reached in the Australian decision in *Daniels v Anderson*[123] the South African courts have also changed their approach and are now following a more objective approach to determine a director's breach of his/her duty of care and skill.[124]

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[120] This entails that the five elements of delict must be proven for liability to arise the liability for breach is based on Roman-Dutch law. These elements are conduct, wrongfulness, fault, causation and damage. For more on these five elements, see in general, Neethling J and Potgieter JM *Neethling-Potgieter Law of Delict* 7th ed (LexisNexis South Africa 2015) 9, 10, 25 – 265; Nethavhani K *The Business Judgment Rule: Undue Erosion of Director's Duty of Care, Skill and Diligence* (Published LLM thesis University of Pretoria 2015) 6 – 13. Kennedy-Good and Coetzee 2006 *Obiter* 281 – 283; Stevens 2017 (20) *PELJ* 1 – 23; Kanamugire JC and Chimuka TV "The Director's Duty to Exercise Care and Skill in Contemporary South Africa and the Business Judgment Rule" 2014 *Mediterranean Journal of Social Science* 70.

[121] Neethling and Potgieter *Neethling-Potgieter Law of Delict* 3; *Telematrix (Pty) Ltd t/a Matric Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA).

[122][1911] 1. Ch.D. 425, 437 Cassim *et al. Contemporary Company Law* 555 – 556; see *Re Brazilian Rubber Plantations & Estates Ltd* (1911) Ch 425 (CA) 437; *Fisheries Development Corporation of SA Ltd v Jorgensen: Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* (1980) (4) SA 156 (W).

[123] 16 ACSR 607 CA (NSW) at 664-665.

[124] Du Plessis J "A Comparative analysis of Director's Duty of Care, Skill and Diligence in South Africa and in Australia" 2010 *Acta Juridica* 285 - 286; Kanamugire and Chimuka 2014(20) *Mediterranean Journal of Social Science* 72; Delport *Henochsberg on the Companies Act of 2008* 298. Two earlier Australian cases relating to dormant or silent directors, *Statewide Tobacco Services Ltd v Morley* (1990) 8 ACLC 827 and *Commonwealth Bank of Australia v Friedrich* (1991) 9 ACLC 946 also confirm the objective approach.

Section 76(3)(c) states that a director of a company when acting in that capacity, must exercise the powers and perform the functions of a director with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried by that director; and having the general knowledge, skills and experience of that director.[125] The purpose of this section is to set the standard of the director's conduct in relation to the duty of care, skill and diligence. There are an objective and subjective aspects to this section.[126] In terms of the objective element, all directors who carry out the same function in relation to the company must adhere to the same standard; there is no regard to any one director's particular abilities. The subjective aspect pertains to a director's general knowledge, skills and experience. The combined effect of the objective and subjective standards is that there is a minimum standard that all directors need to adhere to, irrespective of their particular skills, knowledge and experience. However, where a director has a higher degree of skills, knowledge and experience, he/she will be held to a higher standard.[127] The statutory duty of care, skill and diligence impose a less subjective test[128] and a slightly more

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[125] See in general, Nethavhani *The Business Judgment Rule: Undue Erosion of Director's Duty of Care, Skill and Diligence* 14 – 16; Maharaj N *A Discussion of the Duty of Care, Skill and Diligence to be Exercised by a Director in light of the Companies Act 71 of 2008, as well as the Common Law and an Overview of the Business Judgment Rule: A Company Law Perspective* (Published LLM Thesis University of KwaZulu Natal 2015) 28 – 33; Leach J *The correct Understanding of the Business Judgment Rule in section 76 (4) of the Companies Act 71 of 2008: Avoiding the American Mistakes* (Published LLM thesis University of Cape Town 2014) 11 – 13.

[126] Delport *et al.* (ed) *Henochsberg on the Companies Act 71 of 2008* 295.

[127] Nethavhani *The Business Judgment Rule: Undue Erosion of Director's Duty of Care, Skill and Diligence* 14; Cassim *et al. Contemporary Company Law* 559. In the matter of *Dorchester Finance Co Ltd Stebbing* (1989) BCLC 498 (Ch) (United Kingdom), two of the three directors were held liable for negligence since they had higher skills then the third director, who was exonerated. See in general, Job *Common Law Duties and section 76 of the Companies Act, 71 of 2008 Compared* 22 – 23.

[128] However, despite this, the duty still contains an objective as well as a subjective test. See Nethavhani *The Business Judgment Rule: Undue Erosion of Director's Duty of Care, Skill and Diligence* 14. The objective standard relates to all directors who carry out the same functions and must adhere to the same standards whilst the subjective standard pertains to particular director's general knowledge, skills and experience. See Nethavhani *The Business Judgment Rule: Undue erosion of director's Duty of Care, Skill and Diligence* 14.

demanding standard of care on directors and prescribed officers of the company than the common law.[129] The common law relies more on a subjective approach whilst the Companies Act of 2008 adopted an objective-subjective approach.[130] "Care", and "skill" is not exactly the same. In the Australian case of *Daniels v Anderson,*[131] the court indicated that skill refers to the knowledge and experience that a director has as well as to the technical competence of a director. Therefore, the skill would refer to the technical competence of a director while care refers to the manner in which the skill is applied.[132]

Fisheries Development Corporation of SA Ltd v Jorgensen, *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd*[133] remains the leading South African case on the duty of care and skill. The decision

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[129] Cassim *et al. Contemporary Company Law* 558; Job *Common Law Duties and Section 76 of the Companies Ac, 71 of 2008 Compared* 22 – 24; Bouwman 2009 *SA Merc LJ* 509 – 534.

[130] Nethavhani *The Business Judgment Rule: Undue Erosion of Director's Duty of Care, Skill and Diligence* 15; for more on s 76(3) of the Companies Act of 2008, see in general Mupangavanhu BM *Director's Standard of Care, Skill and Diligence and the Business Judgment Rule in View of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (Published DPhil thesis University of Cape Town 2016) 107 – 141.

[131] *Daniels v Anderson* (1996) 16 ASCR 607 (NSW); (1995) 37 NSWLR 438 (Australian). On this matter see in general, Nettle G "The Changing Position and Duties of Company Directors" 2018 (41) *Melbourne University Law Review* 10 – 11; Flint G "Non-Executive Directors'" General Law Duty of Care and Delegation of Duty: But do we need a Common Law Duty of Care" 1997 (9) *Bond Law Review* 198 – 215; Tomasic R *et al. Corporations Law in Australia* 2nd ed (The Federation Press New South Wales Australia 2002) 319- 320; Du Plessis JJ "Open Sea or Safe Harbour? American, Australian and South African business judgment rules compared (Part 1)" 2011 (32) *The Company Lawyer* 349.

[132] Maharaj *A Discussion of the Duty of Care, Skill and Diligence to be exercised by a Director in light of the Companies Act 71 of 2008, as well as the Common Law and an Overview of the Business Judgment Rule: A Company Law Perspective* 15.

[133]*Fisheries Development Corporation of SA Ltd v Jorgensen*, *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) at 165. See generally, Pretorius *Hahlo's South African Law through the Cases* 281 – 282; Loos A (ed*) Directors' Liability: A Worldwide Review* (Wolters Kluwer International 2010) 5 – 7; Cassim *et al. Contemporary Company Law* 556.; Job *Common Law Duties and Section 76 of the Companies Ac, 71 of 2008 compared* 12; Botha 2009 *Obiter* 709 – 710; Stevens 2017 (20) *PELJ* 3 – 4.

relied on early English case law such as *in re Brazilian Rubber plantation and Estates Ltd,*[134] which was the first real attempt by English courts to highlight the importance of director's duties.[135] Since the judgments in *re Brazilian Rubber plantation and Estates Ltd* and *re City Equitable Fire Insurance Co Ltd,*[136] there have been considerable developments regarding the standard of director's conduct in English law. In *Re D'Jan of London Ltd,*[137] a director was found to have been negligent for failing to read a proposal prepared by an insurance broker, and which contained incorrect information, before signing it. Due to the incorrect information, the insurance company refused to pay out a claim relating to fire damage to the property of the company. The company subsequently went into liquidation, and the liquidators decided to sue the director to recoup monies owed to creditors. The judgment was in favour of the applicant as the court agreed that the director had been negligent in exercising his duty of care and skill. When the degree of care, skill and diligence expected of a

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[134] *In Re Brazillian Rubber plantation and Estates Ltd* (1911) 1 CH 425 (United Kingdom) 425. See generally, Pretorius *Hahlo's South African Law through the Cases* 280; Cassim *et al. Contemporary Company Law* 555 – 556.

[135] For more on this matter, see Pretorius *Hahlo's South African Law through the Cases* 280 – 281; Bekink 2008 *SA Merc LJ* 99. Cassim *et al. Contemporary Company Law* 556 – 557; Butcher *Directors Duties: A New Millennium, A New Approach?* 40 - 41; Cahn A and Donald DC *Comparative Company Law: Test and Cases on the Laws Governing Corporations in Germany, the UK and the USA* (Cambridge University press United Kingdom 2010) 370; Cheffins BR *Company Law: Theory, Structure and Operation* (Oxford University Press United Kingdom 2008) 323, 539.

[136] *In Re City Equitable Fire Insurance Co Ltd* (1925) 1 CH 407 (United Kingdom).

[137] *Re D'Jan of London Ltd* (1994) 1 BCLC 561 (Ch) (United Kingdom).). See Butcher *Directors' Duties: A New Millennium, A New Approach?* 57 – 58; Birds J *et al. Boyle & Birds Company Law* 6th ed (Jordans United Kingdom 2007) 623; Cheffins *Company Law: Theory, Structure and Operation* 265, 314, 539, 545. In this matter, a company had suffered a shortfall in its funds as a result of its managing director committing fraud and who was convicted for this crime. The liquidator of the company then wanted to hold the other directors equally liable for the losses causes to the company since they had failed to pick up the fraud being committed by the managing director. Ultimately, these directors were not found at fault due to a clause that was inserted in the company's constitution. The judge held that directors must use the degree of care which an ordinary man might be expected to take in the circumstances. The judge added that a director need only exhibit the skill of a person of his knowledge and experience. See Maharaj *A Discussion of the Duty of Care, skill and diligence to be exercised by a director in light of the Companies Act 71 of 2008, as well as the Common Law and an Overview of the Business Judgment rule: A Company Law Perspective* 15.

director is determined, courts will take into account the nature of the company, the nature of the decision taken, the position of, and the nature of the responsibilities undertaken by the director.[138] Directors collectively and individually have a continuing duty to acquire and maintain sufficient knowledge and understanding of the company's business to enable them to discharge their duties as directors. At the minimum, a basic knowledge of the company's business is required.[139] In the author's opinion, this knowledge and understanding must also include knowledge of the company's governance documents like the Memorandum of Incorporation, shareholders agreement, company resolutions, policies etc. However, while the Companies Act of 2008 does not require any qualifications or experience for directors, the Higher Education Act of 1997 requires that Council members "must be a person with knowledge and experience relevant to the objects and governance of the public higher education institution concerned."[140] In the author's opinion, Council members must also know and understand the fiduciary duties and the duty of care and skill owed to the institution.

A director may rely on certain persons to assist him/her in discharging his/her duties.[141] However, the director retains the liability imposed by the obligations.[142] Directors will not be liable for mere errors in judgment. In

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[138] Cassim *et al. Contemporary Company Law* 560.

[139] See *Barings PLC no 5* (2000) BCLC 523 (United Kingdom); Cassim *et al. Contemporary Company Law* 560 – 561.

[140] Section 27(7)(a) of the Higher Education Act of 1997.

[141] Section 76(4)(b). See generally, Bouwman 2009 *SA Merc LJ* 514 – 515; Cassim *et al. Contemporary Company Law* 558; Yeats *et al. Commentary on the Companies Act of 2008* p2-1283; Delport *et al. Henochsberg on the Companies Act of* 2008 289.

[142] Deloitte "Director Duties" (2013) 26; F*isheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) where the following was stated "in respect of duties that may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. He is entitled to accept and rely on the judgment, information and advice of the management, unless there are proper reasons for querying such. Similarly, he is not expected to examine entries in the company's books. Obviously, a director exercising reasonable care would not accept information and advice blindly.

Leven v Feld and Tweeds Ltd[143] for instance, the court found that it was not the duty of the court to take over the functions of directors and to consider what was in the best interests of the company's business. In summary, the Council may delegate functions to Council committees, but it does not divest them from responsibility.[144]

Council members, as well as executive management, owe a duty of care and skill, and this duty should also be clarified in the Higher Education Act 1997 similar to the clarification contained in the Companies Act of 2008. As with the fiduciary duties that are discussed above, it will be a recommendation that the duty of care and skill is also included in the Higher Education Act of 1997. It is of utmost importance those Council members as well as the members of the executive management act with the necessary care and skill in executing their duties and making decisions, and that they fully understand this obligation.[145]

4.2.7 The business judgment rule

The business judgement rule has been applied in the United States for over 160 years and has been considered one of the cornerstones of American corporate governance. It started as a common law interpretation relating to a director's duty of care and skill.[146] The rule protects business decisions

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He would accept it and he would be entitled to rely on it, but he would give it due consideration and exercise his own judgment in the light thereof."

[143]*Leven v Feld and Tweeds Ltd* (1951) 2 SA 401 (A) 402C-D. See *Mafikeng Mail (Pty) Ltd v Centner (No 2)* (1996) 4 SA 607 (WLD) 613G-H.; Muswaka L "Director's Duties and the Business Judgment Rule in South African Company Law: An Analysis" 2013 (3) *International Journal of Humanities and Social Science* 90.

[144] Section 29(2) of the Higher Education Act of 1997.

[145] See Chapter 6 below for the recommendations in this regard.

[146] See Chapter 5, para 5.4 below for a discussion of the business judgment rule in the USA. Leach *The Correct Understanding of the Business Judgment Rule in section 76(4) of the Companies Act of 2008: Avoiding the American mistakes* 13; Dyke MJ *The Business Judgment Rule – Its Application in South Africa* (Published LLM thesis University of South Africa 1995) 1 – 37. On the other hand, in Canada the courts are concerned about the reasonableness of a director's decision. See Cassim *et al.*

made by directors in good faith even when the decisions made might be erroneous.[147] One of the best formulations of the business judgment rule can be found in *Aronson v Lewis*[148] which states the following: "….it is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[149]

The business judgment rule was developed alongside the duty of care, and it specifically relates to decision making.[150] This rule does not provide a complete defence against the process that was followed but aims to protect the final decision. Even in the event of a decision made in good faith, a director will not be excluded from liability if it is found that the decision was made without due care.[151] A director can only benefit from this rule if a

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Contemporary Company Law 563; Chapter 5 for a full discussion of the business judgment rule in the USA; Kennedy-Good S and Coetzee L "The Business Judgment Rule (Part 1)" 2006 (27) *Obiter* 66 – 67; Jones E "Director's Duties: Negligence and the Business Judgment Rule" 2007 (19) *SA Merc LJ* 326 for more on the business judgment rule in the USA. However, this rule has not been codified in the USA; they are still relying on the common law.

[147]See in general, McMillan L "The Business Judgment Rule as an Immunity Doctrine" 2013 (4) *William & Mary Business Law Review* 526 – 527; Knepper WE and Bailey DA *Liability of Corporate Officers and Directors* 5th ed (The Michie Company 1993) 53 – 89; the Revised Model Business Corporations Act §4.01. The Business Judgment Rule in the USA will be discussed more fully in Chapter 5, para 5.4 below.

[148] *Aronson v Lewis* 473 A.2d 805 (Del 1984) (United States); Cahn, Donald *Comparative Company Law: Test and Cases on the Laws Governing Corporations in Germany, the UK and the USA* 372; Knepper and Bailey *Liability of Corporate Officers and Directors* 53; Lombard S "Importation of a Statutory Business Judgment Rule into South African Company Law: Yes or No?" 2005(68) *THRHR* 616.

[149] *Aronson v Lewis* 473 A.2d 805 (Del 1984) (United States) at 305; In *In Re Walt Disney Derivative Litigation* 411 (2005) Del (United States) it was made clear that under the business judgment rule, a director's' action does not trigger liability just because it was not up to standard. See Cahn, Donald *Comparative Company Law: Test and Cases on the Laws Governing Corporations in Germany, the UK and the USA* 372, 383 – 415.

[150] Havenga MK "The Business Judgment Rule: Should we follow the Australian Example?" 2000(12) *SA Merc LJ* 27; Jones 2007(19) *SA Merc LJ* 327.

[151] Leach *The Correct Understanding of the Business Judgment Rule in section 76(4) of the Companies Act of 2008: Avoiding the American Mistakes* 14.

decision was made.[152] The office held by a director, by its very nature, imposes various risks, duties and obligations. It is inevitable that a director at some point will face difficult decisions and that not all of them will have positive results. The protection offered by the business judgement rule could encourage acceptance of positions as directors and partake in the risk-taking activities of the company.[153] Since the rule protects directors, it might also encourage more competent people to become directors. It has the effect that decisions made by directors are not subjected to judicial second-guessing. Furthermore, it will also prevent shareholders from approaching the courts to interfere in the management of a company.[154]

Section 76(4) of the Companies Act of 2008 provides for a partially codified version of the business judgment rule.[155] This section relates to the decision-making function of directors and provides that a director will satisfy his/her obligations if he/she has taken reasonably diligent steps to become informed about a matter; he/she had no personal financial interest in the matter or had disclosed any interest as required by section 75, and the director rationally believed that the decision was in the best interests of

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[152] Havenga 2000 *SA Merc LJ* 28; *Francis v United Jersey Bank* 432 A 2d 814 (1981) Sct NJ (United States).

[153] Davis *et al. Companies and other Business Structures in South Africa* 124 – 125; *Smith v Van Gorkom* 488 A.2d (Del. Supre 1985) 858 (United States), which is considered one of the leading cases on the business judgment rule and discussed more fully in chapter 5 below; Bouwman 2009 *SA Merc LJ* 524; Nethavhani *The Business Judgment Rule: Undue Erosion of Director's Duty of Care, Skill and Diligence* 21 – 22.

[154] *Brehm v Eisner* (2000) 746 A 2d 244, 266 (Del Sup) (United States). In this case the court stated that if judges failed to respect the decisions of directors made in good faith, this would have the effect that the courts would become "super-directors", measuring matters of degree in business decision making and executive compensation; Bouwman 2009 *SA Merc LJ* 524; Nethavhani *The Business Judgment Rule: Undue Erosion of Director's Duty of Care, Skill and Diligence* 524.

[155] For more on this section, see in general Davis (ed) *et al. Companies and other Business Structures in South Africa* 124; Van Tonder 2015 *Obiter* 710 – 711; Delport (ed) *et al. Henochsberg on the Companies Act 71 of 2008* 297; Muswaka 2013 *International Journal of Humanities and Social Sciences* 91 – 92; Leach *The Correct Understanding of the Business Judgment Rule in section 76(4) of the Companies Act of 2008: Avoiding the American Mistakes* 20 – 21.

the company.[156] Section 76(4)(a) supplements section 76(3)(b) and (c) by providing that it would be considered that a director has fulfilled the requirements of section 76(3)(b) and (c), if ".....the director has taken reasonably diligent steps to become informed about the matter; either the director had no material financial interest in the subject matter of the decision and had no reasonable basis to know that any elated person had a personal financial interest in the matter or the director complied with the requirements of section 75 with respect to any interest contemplated in this subparagraph, and the director made a decision or supported the decision of a committee or the board with regard to that matter, and the director had a rational basis for believing, and did believe that the decision was in the best interests of the company."[157] If these requirements have been met, the merits and the wisdom of business decisions fall outside the scope of juridical review.[158] The business judgment rule will not apply where directors have failed to comply with their oversight and monitoring functions; as well as in instances where directors renounced their duties to oversee the management the company and they fail to act in the best interest of the company. However, even in the event where a director is aware of any wrongdoing or consequences and decisions not to act or fails to act, it still amounts to a business decision. According to Van Tonder, the oversight function may create an incentive for directors to react on suspicion of

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[156] See also Davis (ed) *et al. Companies and other Business Structures in South Africa* 124; Van Tonder 2018 (39) *Obiter* 314; Muswaka 2013 (3) *International Journal of Humanities and Social Science* 89 – 90; van Tonder 2016 (36) *Obiter* 563 – 564. The decision-making function is discussed in para 4.2.5 above.

[157] See in general, Cassim *et al. Contemporary Company Law* 564; *Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd* (1927) 2 KB 9 (CA) 23 (United Kingdom); Leach *The Correct Understanding of the Business Judgment Rule in Section 76 (4) of the Companies Act 71 of 2008: Avoiding the American Mistakes* 19; Nethavhani *The Business Judgment Rule: Undue Erosion of Director's Duty of Care, Skill and Diligence* 21 – 22; Yeats *et al. Commentary on the Companies Act of 2008* p2-1282 – 1284; Muswaka 2013(3) *International Journal of Humanities and Social Science* 90 – 92.

[158] See the matter of *Australian Securities and Investment Commission v Rich* (2009) NSWSC (Australia); Delport *et al.* (ed) *Henochsberg on the Companies Act 71 of 2008* 298(8); Van Tonder 2018(39) *Obiter* 314 – 315.

wrongdoing and therefore gain the benefit of the business judgment rule, and rightly so.[159]

Although common law principles can address some of the concerns related to corporate governance in higher education law, the author suggests that this is an opportune time to follow the example of South African company law and to provide for a partial codification supplemented by common law. A statutory provision of the business judgment rule might provide Council members with the necessary assurance that their decisions will be protected if they were made in the best interests of the institution.

4.2.8 Liability for breaches of duty

Many directors of companies are not aware of their duties nor that they can be held personally liable in the event of a breach of these duties. Viviers provides a concise summary of the forms of liability directors may be exposed to criminal liability (section 214 of the Companies Act of 2008) in instances where directors are trading in such a way that it defrauds creditors; civil liability (section 218 of the Companies Act of 2008),[160] which provides for joint and several liability for a breach of directors duties; breach of fiduciary duties (section 76(3)(a) and (b) of the Companies Act of 2008 where a director will be held personally liable for any loss, damage or

[159] Van Tonder 2018 (39) *Obiter* 314 – 315.

[160] Section 218(2) states, "any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention." See *Chemfit Fine Chemicals (Pty) Ltd t/a SA Premix v Maake and Others* (5772/2016) [2017] ZALMPPHC 29 – 38 where the court found that the applicant should succeed in his alternative claim in its Notice of Motion since section 218(2) is a general enabling remedy. In the matter of *Hlumisa Investment Holdings (RF) Limited & another v Kirkins & Others* (100390/2015) [2018] ZAGPPHC 863, the shareholders of African Bank Investments Limited failed in their claim in terms of section 218(2) of the Companies Act of 2008 against the directors and auditors of African Bank. The shareholders were alleging that due to the conduct of the defendants there was a drop in the share price, which resulted in a loss to the shareholders. The loss that was claimed was the reduction in the value of the shareholders' shares in the company, which is in fact a loss suffered by the company, African Bank Investments Limited and African Bank. There was no allegation of unlawful conduct made against the directors and the auditors. Section 218(2) requires that a loss must occur "as a result of that contravention." Therefore, the court found that no such loss was proven.

costs sustained by the company; breach of the duty of care and skill (section 76(3)(c)) of the Companies Act of 2008 where a director will be held responsible in terms of civil law for any loss, damages and costs sustained by the company; liability for breaching the Companies Act of 2008 in which instance a director will be held personally liable for any direct or indirect consequences of a breach of his/her duties; and liability towards the shareholders of the company under certain circumstances.[161] Directors should, therefore, ensure that they thoroughly understand their duties and obligations to ensure that they avoid any potential liability.

One of the most litigious areas relating to personal civil liabilities relates to fraudulent and reckless trading.[162] Section 77 of the Companies Act of 2008 provides for the liability of directors and prescribed officers.[163] Subsection (2)(a) incorporates the common law principles relating to director's fiduciary duties in respect of specific duties, providing that "….a director of

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[161] Viviers D "The Liability of Company Directors" October 2018 *PhatsShoaneHenney Attorneys* https://www.phinc.co.za/NewsResources/NewsArticle.aspx?ArticleID=2651 (Date of use: 18 November 2018).

[162] See generally Sigwadi M "Compromise and Personal Liability under Section 424 of the Companies Act 61 of 1973" 2003 (15) *SA Merc LJ* 387 – 395; Cassim FHI "Fraudulent or Reckless Trading and Section 424 of the Companies Act" 1998 *SA Law J* 162 – 172; Havenga MK "Creditors, Directors and Personal Liability under Section 424 of the Companies Act" 1992 (4) *SA Merc LJ* 63 – 69; Hambidge EG and Luiz SM "Compromise and Personal Liability under Section 424 of the Companies Act: Two Judicial Approaches" 1991 *SA Merc LJ* 123 – 128; Phungula 2016(37) *Obiter* 695 - 702 for a full discussion of s 424 of the *Companies Act of 1973; Philotex (Pty) Ltd v Snyman; Braintex (Pty) Ltd v Snyman* 1998 (2) SA 742 WLD; *Cape Specific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 A; *Ex Parte De Villiers and Another NNO: in re Carbon Developments (in liquidation)* 1993 (1) SA 493 A; *Fisheries Development Corporation of SA Ltd v Jorgenson and another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and others* 1980 (4) SA 156 W. For more on the history and a full discussion of s 424, see Blackman *et al. Commentary on the Companies Act of 1973* 521 – 554.

[163]See in general Cassim *et al. Contemporary Company Law* 582. Section 20(6) of the Companies Act of 2008 also deals with liability. It states the following "Each shareholder of a company has a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with this Act; or a limitation, restriction or qualification contemplated in this section, unless that action has been ratified by the shareholders in terms of subsection (2)." See also Grove *Company Directors: Fiduciary Duties and the Duty of Care and Skill* 39; Yeats *et al. Commentary on the Companies Act of 2008* p2-1287 – 1289; Delport *Henochsberg on the Companies Act of 2008* 301 - 308.

a company may be held liable in accordance with the principles of the common law relating to the breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in this section."[164]

Section 77(2)(a) of the Companies Act of 2008 links the statutory duties to the common law fiduciary duties.[165] Section 77(2)(b) of the Companies Act of 2008 further provides that a director of a company may be held liable based on the common law principles relating to delict for any losses or damages which the company may suffer due to a breach of the duty of care and skill (set out in section 76(3(c)) of the Companies Act of 2008: losses due to a breach of the Companies Act not specifically mentioned in section 77 of the Companies Act of 2008; and losses due to the contravention of any provisions of the company's Memorandum of Incorporation.

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[164] This section is supplemented by s 218(2) of the Companies Act of 2008, which states that a person who has contravened any provision of the Act, is liable to any other person for any loss or damage suffered by that person as a result of that contravention. See in general, Davis *et al. Companies and other Business Structures in South Africa* 125 – 127; Hendrikse JW and Hefer-Hendrikse L *Corporate Governance Handbook: Principles and Practice* 2nd ed (Juta South Africa 2012) 285; Cassim *et al. Contemporary Company Law* 582 – 586; Bradstreet R "Implications of the re-enacted discretionary power to grant Judicial Relief to Directors in terms of section 77(9) of the Companies Act of 2008" 2015(27) 2015 *SA Merc LJ* 147; Stevens AG *A Critical Analysis of section 77(2)(a) of the Companies Act 2008 in light of the Common Law Remedy of Disgorgement* (Published LLM Thesis University of Cape Town 2016) 35 – 52. See also s 20(6) of the Companies Act of 2008, which provides that each shareholder has a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act or a limitation, restriction or qualification in the company's Memorandum of Incorporation, unless ratified by a special resolution. In accordance with common law, a director may be held liable for a breach of a fiduciary duty for any loss, damages or costs sustained by the company as a consequence of the breach by a director of a director. This also applies to alternate directors, members of the audit committee as well as members of other board committees, irrespective of whether or not these members are directors or not. See further Cassim *et al. Contemporary Company Law* 582 - 583.

[165] Cassim *et al. Contemporary Company Law* 583. However, while the subsection applies to liability for loss, damages or costs sustained by a company, it does not provide for the disgorgement of profits made by a director in breach of the no-profit rule, which applies even where the profit is not made at the expense of the company: *Regal (Hastings) Ltd v Gulliver (*1942) 1 All ER 378 (HL); (1967) 2 AC 134 (United Kingdom) where the directors were required to disgorge profits made by them even though the company had suffered no loss and may actually have benefited from their actions.

Section 77(3) of the Companies Act of 2008 states that

a director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having –

(a) acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;
(b) Acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1);
(c) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud an accreditor, employee or shareholder of the company, or had another fraudulent purpose;
(d) signed, consented to, or authorised, the publication of (i) any financial statements that were false or misleading in a material respect; or (ii) a prospectus or a written statement that contained an untrue statement or a statement to the effect that a person had consented to be a director of the company, when no such consent had been given, despite knowing that he statement was false, misleading or untrue, as the case may;
(e) been present at a meeting, or participated in the making of a decision in terms of section 74 and failed to vote against (i) the issuing of any unauthorized shares, despite knowing that those shares had not been authorised in accordance with section 36; (ii) the issuing of any authorised securities, despite knowing that the issue of those securities was inconsistent with section 41; (iii) the granting of options to any person contemplated in section 42(4) despite knowing that any shares for which the options could be exercised, or into which any securities could be converted had not been authorised in terms of section 36; (iv) the provision of financial assistance to any person contemplated in section 44 for the acquisition of securities of the company, despite knowing that the provision of financial assistance was inconsistent with section 44 or the company's MoI; (v) the provisions of financial assistance to a director for a purpose contemplated in section 45, despite knowing that the provision of financial assistance was inconsistent with that section or the company's MoI; (vi) a resolution approving a distribution, despite knowing that the distribution was contrary to section 46; (vii) the acquisition by the company of any of its shares, or the shares of its holding company, despite knowing that he acquisition was contrary to section 46 or 48; or (viii) an allotment by the company, despite knowing that the allotment was contrary to any provision of Chapter 4.

In *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and Others*[166] the plaintiff company instituted action against the defendants after concluding a contract for the delivery of clothing. The first defendant failed to pay for the order. The plaintiff company instituted action against the defendant company and its directors based on the fact that the directors of the defendant company knew that the company had no money or assets to pay for the order of clothing. The action was based on sections 77(3)(b), 22(1) and 77(6) of the Companies Act of 2008. However, the defendants argued that the plaintiff was not entitled to rely on these provisions, as it was a third party creditor and should instead have relied on sections 22, 76 and 218 of the Companies Act of 2008.[167] The court dismissed the plaintiff's argument and found that a third party creditor can indeed hold the directors of a company liable for loss, damages and/or costs it had suffered due to the director(s) continuing to carry on with the business of the company despite knowing that it was being conducted in a reckless manner, with gross negligence and the intent to defraud another person.[168] The Plaintiff was successful in proving its case based on sections 77(3(b), 22(1) and 77(b).

Section 77(5) of the Companies Act of 2008 provides as follows:

> If the board of a company has made a decision in a matter that contravened this Act, as contemplated in subsection (3)(e) -
> (a) the company, or any director who has been or may be held liable in terms of subsection (3)(e), may

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[166] 22288/2014) [2016] WCC ZAWCHC 35, see also *Chemfit Fine Chemicals (Pty) Ltd t/a SA Premix v Maake and Others* (5772/2016) [2017] ZALMPPHC 27 at para 39 where the court agreed with the finding in *Blue Farm Ltd v Rapitrade 6 (Pty) Ltd and Others*.

[167] *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and Others*22288/2014) [2016] WCC ZAWCHC *1, 3 -5, 10.*

[168] See also *Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ) were the same argument presented, but was rejected by Du Plessis AJ in para 22 as follows "I....find that a third party can hold a director personally liable in terms of the Act for acquiescing in or knowing about conduct that falls within the ambit of s 22(1) thereof." See Myburg E "Holding delinquent directors personally liable" July 2017 *De Rebus* 30 – 31.

> apply to a court for an order setting aside the decision of the board; and
> (b) the court may make – (i) an order setting aside the decisions in whole or in part, absolutely or conditionally; and (ii) any further order that is just and equitable in the circumstances, including an order to rectify the decision, reserve any transaction, or restore any consideration paid or benefit received by any person in terms of the decision of the board; and requiring the company to indemnity any director who has been or may be held liable in terms of this section, including indemnification for the costs of the proceedings under this subsection.

Stevens, in the author's view, correctly, indicates that the basis for liability may not necessarily be only delictual in nature, but may also be contractual.[169] Section 77 imposes far-reaching liabilities for the contravention of the Companies Act by directors of a company, especially in light of the decision in *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and Others* where it was found that a third party can hold directors liable.

There is no known case law pertaining to a university Council or management being held accountable for a breach of common law fiduciary duties owed to the university. It was recently reported in the press that the University of Johannesburg issued a summons against, amongst others, a Council member and a former member of its executive management for breach of their fiduciary duties after allegations that they defrauded the university of approximately R30 million. The matter relates to allegations that these two senior members of the university used opportunities meant for the university for their personal benefit.[170] The university has

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[169] Stevens 2017 (20) *PELJ* 1. See also, Van Warmelo P "Liability in Contract and in Delict" 1985 (102) *SALJ* 227 – 231. In *Lillicrap, Wassenaar and Partners v Pilkington Brothers SA (Pty) Ltd* 1985 1 SCA the court held that a delictual remedy is not available to a plaintiff where the negligence relied upon a breach of a contractual term. For more on this matter, see Hutchinson D and Visser DP "*Lillicrap* Revisited: Further thoughts on Pure Economic Loss and Concurrence of Actions" 1985 (102) *SALJ* 587 - 595. Also, see *Pinshaw v Nexus Securities (Pty) Ltd* 2002 2 SA 510 (C) where a claim for economic loss caused by bad investments was lodged against one of the directors of a company based on gross negligence, recklessness and fraud. The company itself was also sued for breach of contract based upon allegations of dishonesty and acting in bad faith.

[170] See in general, Tshwane T "2 Senior UJ Managers Accused of Defrauding University of R25m" 2017-07-30 *Eyewitness News;* Seale L "UJ Bosses Suspended over Graft

subsequently obtained a summary judgment against these individuals through which they will be able to recover some of the monies. However, these two individuals have applied for a revision of the judgment, and the matter is currently *sub judice*.

4.2.9 Removal of directors

The authority or power to remove or discipline a member of Council is currently limited. The only basis for disciplining a Council member is when he/she contravenes subsections 7(c),[171] (d)[172] or (e),[173] (7A)[174] or (7B) of the Higher Education Act of 1997.[175] In terms of section 27(7E)(a) of the Higher Education Act of 1997, the Council must have a code of conduct that provides for the disciplining of Council members when these sub-sections are contravened. However, it does not specifically provide that a Council

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Allegations" 2017-0730 *Weekend Argus*; Nkosi B "UJ Retrieves Stolen R14m from Execs" 2018-08-08 *The Star*.

[171] This sub-section provides as follows: "a Council member must before he or she assumes office, and annually for as long as he or she continues to hold such office, declare any business, commercial or financial activities undertaken for financial gain that may raise a conflict or a possible conflict of interest with the public higher education institution concerned."

[172] This sub-section provides as follows: "A Council member may not place himself or herself under any financial or other obligation to any individual or organisation that might seek to influence the performance of any function of the council."

[173] This sub-section provides as follows: "(i) A Council member may not have a conflict of interest with the public higher education institution concerned; (ii) may not have a direct or indirect financial, personal, or other interest in any matter to be discussed at a meeting, or in regard to which he or she is to make a decision in terms of a delegated function, and which entails or may entail a conflict or possible conflict of interest with the public higher education institution concerned; (iii) must, before the meeting of the council or the committee concerned and in writing, inform the chairperson of that meeting of the existence of a conflict or possible conflict of interest."

[174] This section provides as follows: "Any person may, in writing, inform the chairperson of a meeting of the council or a committee of the council concerned, before that meeting, of a conflict or possible conflict of interest of a member of the council or of a committee of the council with the public higher education institution concerned of which such person may be aware." It seems unclear how this section can be contravened.

[175] This section provides as follows: "A member referred to in subsections (7) *(e)* and (7A) is obliged to recuse himself or herself from the meeting during the discussion of the matter and the voting thereon."

member may be removed, only that they are disciplined. There is a clear lacuna in this provision as "disciplining" a Council member may not be enough: The Act should provide for the removal of a Council member. Although there are some Institutional Statutes or Council Code of Conducts[176] that provide for suspension or removal of Council members, it is the author's view that in the absence of a statutory provision for the removal of Council members, such actions might be perceived as being ultra vires the Higher Education Act of 1997.

It is therefore essential to include similar provisions to those contained in section 71 of the Companies Act of 2008 in the Higher Education Act of 1997, to provide a Council with the statutory power to suspend or remove a Council member.

Section 71 of the Companies Act of 2008 provides for the removal of a director by either the shareholders or the board of directors.[177] In terms of section 71(3), a director can be removed if he/she becomes ineligible or disqualified in terms of the Companies Act of 2008, is incapacitated, or has neglected or been derelict in the performance of his/her duties.[178] In

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[176] For instance, the Codes of Conduct of the Durban University of Technology, the Nelson Mandela University, the University of Stellenbosch, and the University of South Africa.

[177] For the purposes of this study, it is irrelevant to discuss the removal of directors by shareholders. The removal of a director by a board will be discussed only briefly to provide context for the inclusion of a similar provision in the Higher Education Act of 1997. On the topic of removal of directors see in general, Cassim R *A Critical Analysis of the Removal of Directors by the Board of Directors and the Judiciary under the Companies Act 71 of 2008* (Published LLD thesis University of South Africa 2018) 94 – 218; *Ncube CB "You're Fired! The Removal of Directors under the Companies Act 71 of 2008"* 2016 (128) *SALJ 37 – 44;* Delport(ed) *et al. Henochsberg on the Companies Act of 2008 273 – 274;* Leseyane SL C*ritical Analysis of section 71 of the Companies Act 71 of 2008 (*Published LLM thesis University of Johannesburg 2017) 10 – 12; Stein and Everingham *The New Companies Act Unlocked* 232*;* Delport *Henochsberg on the Companies Act of 2008* 273; Yeats *et al. Commentary on the Companies Act of 2008* p2-1266 – 1267.

[178] For more on the removal of directors see Cassim *A Critical Analysis of the Removal of Directors by the Board of Directors and the Judiciary under the Companies Act of 2008* 61 – 219; Cassim *et al. Contemporary Company Law* 444; Davis (ed) *et al. Companies and other Business Structures in South Africa* 141; Cassim 2016 *SALJ* 133 – 135; Ncube 2011 *SALJ* 33 – 51. One of the first cases that dealt with a removal of a

Steenkamp and Another v Central Energy Soc and Others,[179] the applicants unsuccessfully approached the court on an urgent basis to set aside their removal as directors of PetroSA. According to the applicants, they had been unlawfully removed as directors in terms of the Companies Act of 2008. They furthermore contended that their removal was unlawful in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[180]

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director in terms of section 71 was *Pretorius v PB Meat (Pty) Ltd* [2013] ZAWCHC 89. This case dealt with the removal of two directors who in return contested their removal. The applicants had resigned as employees of the company but refused to resign as directors as required by their employment contracts signed with the company. Subsequently, a meeting of the board of directors was called to consider a resolution to remove the applicants as directors on the basis that they had been derelict in the performance of their functions as directors. The applicants required more information, which the company provided. However, the applicants felt that the information provided was not sufficient. The court had to rule on whether the documents as requested by the applicants had to be produced by the company in order to satisfy the "sufficient specificity" requirement contained in s 71(4) of the Companies Act; see in general see Cassim 2016 *SALJ* 134, 139 - 142; Delport (ed) *et al. Henochsberg on the Companies Act of 2008* 274 (2).

[179] *Steenkamp and Another v Central Energy Soc and Others* 2018 (1) SA 311 (WCC).

[180]The Central Energy Fund (CEF), the only shareholder of PetroSA, had suffered large losses relating to a certain project, and the company was in urgent need of a turnaround strategy for the improvement of the company. The CEF was of the opinion that part of the turnaround strategy for the company was going to be a strengthened with the restructuring of the board. As a consequence, they planned on removing certain directors from the board. The directors were provided with the required notice to make representations. The applicants were subsequently removed as directors of the company. The application was based on two grounds the one being that the CEF did not comply with the relevant provisions of the Companies Act. It was alleged that the CEF should have relied on s 71(8) rather than s 71(1) of the Companies Act of 2008. The applicants therefore argued that the CEF could not lawfully remove them as directors in terms of s 71(1) and (2), as the nature of the allegations made against the directors triggered the procedural regime contemplated in section 71(3). In addition, they contended that they were the only two directors left at the time, following the resignation of the other directors that had been identified by CEF. The court found that there was no basis for the applicants' argument and that it was based on a misreading of s 71. Furthermore, the court also found that the fact that there were only two directors left was irrelevant because the removal was done by the only shareholder at a shareholders' meeting. The court therefore found that any challenge by the applicants that their removal as directors based on non-compliance with s 71 of the Companies Act had failed. The second part of their application was based on the administrative law; they submitted that a decision to remove PetroSA's entire board, including the applicants, was unreasonable and disproportionate, arbitrary and irrational. As such, the applicants contended that the decision must be reviewed in terms of s 6 of PAJA and set aside. The applicants also failed on the second part of their application and their application was therefore dismissed. For more on this matter see Saba A "Minister set to "cripple" energy fund" 2017-08-25 *Mail & Guardian*.

4.2.10 Declaring a director delinquent

The parties who have *locus standi* for actions are many and include a company, a shareholder, a director, a company secretary or prescribed officer of a company, a registered trade union that represents employees of a company, and the Companies Commission and the Takeover Regulation Panel.[181] In terms of section 162(5) of the Companies Act 2008,[182] a court *must* declare a director delinquent when the director consented to be a director or acted as a director while being ineligible or disqualified in terms of section 69 of the Companies Act of 2008. Section 162(5) (c) furthermore confirms that a director must be declared delinquent when he/she have grossly abused his/her position as a director; taken advantage of information or an opportunity for personal gain; intentionally or by gross negligence, inflicted harm upon the company or a subsidiary of the company; or acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust concerning the performance of the director's functions within, and duties to the company.[183] The first reported case where section 162 was invoked was *Kukama v Lobelo and others.*[184] Legal

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[181] See s 162 (2) and (3) for the specific grounds of delinquency or probation which are available. See in general Cassim *A Critical Analysis of the Removal of Directors by the Board of Directors and the Judiciary under the Companies Act of 2008* 328 – 460; Cassim *et al. Contemporary Company Law* 436 – 438.

[182] Levenstein E "The delinquent director: No tolerance for errant directors?" 2013 *Legalbrief* http://www.werksmans.com/wp-content/uploads/2013/04/160_JN5493-Werksmans-Brief_The-Delinquent-Director1.pdf (Date of use: 30 August 2018); Levenstein E "The Delinquent Director" 2010 *Without Prejudice* 21 – 22; Davis (ed) *et al. Companies and other Business Structures in South Africa* 134 – 138; Delport *et al. Henochsberg on the Companies Act of 2008* 563 – 566.

[183] Section 162 is very comprehensive and not all the detail will be discussed. The essence of the reasons for declaring a director delinquent is important to mention here in the context of the removal of a Council member. See in general, Cassim R "Delinquent Directors under the Companies Act 71 of 2008" 2013 *De Rebus* 26; Cassim *et al. Contemporary Company Law* 436 – 437.

[184] *Kukama v Lobelo and others* (38587/2011) 2012 ZAGP JHC (unreported) 60. The matter went on to appeal in *Lobelo and Another v Kukama and Others* (38587//2011) 2013 ZAGPJHC 137, but the appeal was dismissed. See generally, Davis (ed) *et al. Companies and Other Business Structures in South Africa* 138; Patel M "Illicit outflow of capital from South Africa eliminated by statutory duties placed on directors" 2015 *De Rebus* 48- 49; Cassim 2016 *PELJ* 2 – 3; Du Plessis and Delport 2017 *SALJ* 285; Also see *Msimang No and Another v Katuliiba and Others (11/23050)* 2012 ZAGPJHC

action was instituted by the applicant (K) against his business partner (L) for the misappropriation of more than R60 million. K and L were equal shareholders of two companies. Both were directors of company A, but only L was a director of company B. The South African Revenue Service (SARS) paid certain tax refunds to company B on the instruction of L. However, one of these refunds was fraudulently obtained. L then utilised the monies for other purposes other than for the benefit of company B. K then brought an action to declare L a delinquent director and to have him removed as a director of the other companies on whose boards he sat.[185] By utilising the funds received from SARS for the benefit of other companies which were not subsidiaries of company B, L acted in breach of the fiduciary duties he owed to company B. Furthermore, the failure to inform SARS of the fraud and pay the money back amounted to gross negligence and wilful misconduct on the part of L.[186] The court granted the application as L's conduct fell short of the standard expected of a director and his actions amounted to wilful misconduct, breach of trust and a gross abuse of his position as director.[187]

240; 2013 1 All SA 580 (GSJ); See further Davis (ed) *et al. Companies and Other Business Structures in South Africa* 140; Delport (ed) *et al. Henochsberg on the Companies Act of 2008* 565.

[185] The application was brought in terms of ss 22, 76(2) and (3), s 77(3)(a)(b) and (c) as well as s 162(5)(c)(i) – (iv) of the Companies Act of 2008. K alleged that s 76(2)(b) creates a duty on the part of a director to communicate at the earliest practicable opportunity any information that comes to their attention to the board. In this instance, L should have disclosed that there was a fraudulent claim to SARS. The effect of this fraudulent SARS claim caused irreparable harm to company B. See in general, Du Plessis J and Delport P "'Delinquent Director's and 'Directors under Probation': A Unique South African Approach Regarding Disqualification of Company Directors" 2017 *SALJ* 285 – 286.

[186] Section 76(2)(b) of the Companies Act of 2008 imposes a duty on a director to notify his/her board of directors at the earliest possible time of any information that comes to his/her attention. It was clear that the first respondent had failed in this duty. The effect of this failure not only caused irreparable harm to the second respondent as envisioned in s 162(5)(c)(iii) of the Companies Act of 2008, but also led to additional criminal liability in terms of s 332(1) and (2) of the Criminals Procedure Act 51 of 1977 as amended. See in general, Du Plessis and Delport 2017 *SALJ* 285.

[187] For a succinct discussion of the case see Cassim 2013 *De Rebus* 26; Du Plessis and Delport 2017 *SALJ* 285- 287.

In the second reported decision, *Gihwala v Grancy Property Limited*,[188] the Supreme Court of Appeal unanimously approved the declaration of delinquency made in the court *a quo* against the first and second appellants.[189]

The inclusion of delinquency proceedings are recommended first to ensure that individuals who have been declared delinquent in terms of the Companies Act of 2008 should not be eligible for election as Council members;[190] and secondly, the Higher Education Act of 1997 should include

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[188] *Gihwala v Grancy Property Limited* 2016 ZASCA 35. See Cassim 2016 *PELJ* 3 – 7; Van Zyl G and Smit M "Delinquent Directors" 2016 *Without Prejudice* 19 – 22; Du Plessis and Delport 2017 *SALJ* 286 – 292; Pansegrouw L *The Delinquent Director – No Room for Errant Directors in the New Companies Act* (Unpublished LLM thesis University of Johannesburg 2017) 6 – 7: Delport *et al. Henochsberg on the Companies Act of 2008* 568.

[189] In this matter the Supreme Court of Appeal first had to confirm whether s 162(5)(c) of the Companies Act of 2008 had retrospective effect, and whether it was unconstitutional. The facts were as follows: the first and second appellants were directors of Seena Marena Investments (Pty) Ltd (hereinafter referred to as SMI). In 2005, the first and second appellants entered into a verbal agreement with Grancy Property Limited (hereinafter referred to as GPL) for the company to acquire a one-third shareholder in SMI. However, the second appellant lacked the financial resources to pay for his shares and consequently, the first appellant and GPL had to loan money to the second appellant to enable him to pay for his shares. However, the business relationship of the parties soured for various reasons, and both the first and second appellant failed to register GPL as a shareholder of SMI. It came to the attention of GPL that the first and second appellants had made various payments to themselves, and had received dividend payments as well, without sharing any of the funds with GPL. Subsequently, GPL sought an order *inter alia*, declaring the first and second appellants delinquent directors in terms of s 162(5)(c) of the Companies Act of 2008. The court *a quo* granted the order. The first and second appellants argued that s 162(5) was unconstitutional on the grounds that it was retrospective in its application, and that there was no discretion vested in the court by s 162(5)(c) and (6) to refuse to make a delinquency order or to moderate the period of such order to less than seven years. The court found that the court *a quo* had correctly rejected the attacks on the constitutionality of s 162(5)(c) of the Companies Act of 2008, and the appeal against the delinquency orders granted by the court *a quo* failed. See in general, Cassim 2016 *PELJ* 2 – 25; Du Plessis and Delport 2017 *SALJ* 286.

[190] The ineligibility of a Council member and chair of Council was highlighted in the matter of *Williams and Another v University of the Western Cape and Others* (24537/2015) [2016] ZAWCHC 198. Although delinquency proceedings were not the subject matter of the case, the information relating to the chair of Council being declared delinquent in terms of the Companies Act of 2008 came to the attention of the court during the proceedings. In short, the details of the case are as follows: Two Council members were suspended following a complaint from the SRC to Council based on these two Council members attending a "prayers for peace" meeting. The two members indicated that they were attending in their personal capacities and not in their capacities as Council members. These two Council members were suspended with

similar provisions to those contained in section 162 to provide for a Council member who abused his/her position as a Council member; took personal advantage or information or an opportunity meant for the institution for personal gain; intentionally or by gross negligence inflicted harm upon the Council; acted in a manner that amounted to gross negligence, inflicted harm upon the institution; or acted in a way that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the duties of the Council member to be declared delinquent and prevent him/her to serve on a different university's Council.

Section 162 must be read in conjunction with section 76(2)(a).[191] It provides that where a director has contravened section 76(2)(a) by taking advantage of information or an opportunity or acting in a grossly negligent fashion that caused harm to the company, the director must be declared delinquent. In *Lewis Group Limited v Woollam*,[192] the court held that a shareholder could not institute delinquency proceedings against directors using a derivative action in terms of section 165, but that such proceedings should be brought under section 162.[193]

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immediate effect. They were not provided with notice that their suspension would be discussed at a Council meeting. The applicants brought their action against the institution, requesting the court to declare their suspension unlawful and to reinstate them as Council members. The applicants alleged that they were suspended as an act of revenge because of their criticism of the chair of Council. This criticism related to information that came to the attention of the applicants pertaining to the chair of Council being declared a delinquent person in terms of the Companies Act of 2008 and which information he had failed to disclose to Council when he was nominated. The applicants were successful in their application and were reinstated as Council members. However, the author is of the opinion that someone who has been declared delinquent by a court of law should not be eligible for election as a Council member and should specifically not act as chairperson of the Council.

[191] Section 76(2)(a) provides that a director of a company must (a) not use the position of director or any information obtained while acting in the capacity of a director – (i) to gain an advantage for the director or for another person other than the company or a wholly-owned subsidiary of the company; or (ii) to cause harm to the company or a subsidiary of the company knowingly. Section 76(2) is discussed above in section 4.2.5.

[192] *Lewis Group Limited v Woollam* 2017 (2) SA 547 (WCC).

[193] Cassim R "The launching of delinquency proceedings under the Companies Act 71 of 2008 by means of the derivative action: *Lewis Group Limited v Woollam* 2017 (2) SA 547 (WCC)" 2017 *Obiter* 673 – 688. For more on derivative actions in general, see

The examples of universities which were placed under administration indicate that Council members, as well as members of the Executive Management, had acted with gross negligence and that their conduct had not been in the best interests of their institutions.[194] In the author's view, the inclusion of delinquency provisions similar to those found in the Companies Act of 2008 in the Higher Education Act of 1997 would serve as a deterrent and prevent Council members who have been declared delinquent at one institution, to move on to another institution and take up a position as either a Council member or a member of the executive management.

4.3 THE BANKS ACT OF 1990

Banks differ from other companies due to the vitally important position they hold in their financial system. Banks are the custodians of the public's money and play an essential role in the South African economy.[195] The Banks Act of 1990 is the primary statute regulating banks.[196] The main purpose of this Act is to protect the public against any losses they may suffer from possible malpractice or negligence on the part of the banks and

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Cassim FM *The Statutory Derivative Action under the Companies Act of 2008: Guidelines for the Exercise of the Judicial Discretion* (Published PhD thesis University of Cape Town 2014) 8 – 190; Cassim FM "Judicial Discretion in Derivative Actions under the Companies Act of 2008" 2013 (130) *SALJ* 778 – 809; Cassim FM "The Statutory Derivative action under the Companies Act: The Role of Good Faith" 2013 (130) *SALJ* 496 – 526; Stoop H "The Derivative Action Provisions in the Companies Act 71 of 2008" 2012 (129) *SALJ* 527 – 553.

[194] The universities that were placed under administration are discussed above in Chapter 3, para 3.3.2(b) above.

[195] For a background on the Banks Act of 1990, see in general Schoeman HC (ed) *et al. An Introduction to South African Banking and Credit Law* 2nd ed (LexisNexis South Africa 2013) 11 – 2. For a discussion of the board of directors of a bank, see De Jager *The Management of Banks in South Africa: Legal and Governance Principles* 433 – 453.

[196] Hereinafter referred to as the Banks Act of 1990. The purpose of the Banks Act of 1990 is to provide for the "regulation and supervision of the business of public companies taking deposits from the public". This study includes only a short summary of its provisions for comparative purposes. See Schoeman (ed) *et al. An Introduction to South African Banking and Credit Law* 11 – 14 for the purpose and application of the Banks Act and De Jager *The Management of Banks in South Africa: Legal and Governance Principles* 430 – 432.

to ensure that the public is protected against any unfair competition by institutions similar to banks.[197] Apart from the Banks Act of 1990, the Companies Act of 2008 and other legislative instruments regulating the banking industry, banks must comply with the *King Code on Corporate Governance*.[198] The board of directors of a bank is responsible for supervising the risk management process of a bank and must, therefore, accept responsibility for protecting the interests of depositors.[199] The Companies Act of 2008 is not the only statute providing for fiduciary duties of directors as well as their duties of care and skill.[200] Section 60 of the Banks Act of 1990 provides for both these duties in respect of directors of banks.[201]

According to section 60(1) of the Banks Act 1990,[202] "each director, chief executive officer and executive officer of a bank owes a fiduciary duty, and a duty of care and skill to the bank of which such a person is a director, chief executive officer or executive officer." Section 60(1A) lists the various duties owed to the bank, namely, to act *bona fide* for the benefit of the bank; avoid any conflict between the bank's interests and the interests of such a director, chief executive officer or executive officer, as the case may

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[197]Sharrock R (ed) *The Law of Banking and Payment in South Africa* (Juta Cape Town 2016) 67.

[198] Sharrock (ed) *The Law of Banking and Payment in South Africa* 105. Corporate governance is discussed in section 4.4 below.

[199] De Jager J "Comments on the Effects of section 40 of the Banks Amendment Act 19 of 2003 on section 60 of the Banks Act 94 of 1990" 2005 (17) *SA Merc LJ* 170.

[200] Schoeman *et al. An Introduction to South African Banking and Credit Law* 116 – 118 for the duties owed by directors of banks.

[201] Section 60 of the Banks Act of 1990 formed part of the Act when it was promulgated and was subsequently further amended.

[202] As amended by s 40(a) of the Banks Amendment Act 19 of 2003. Hereinafter referred to as the Banks Amendment Act. *See Deloitte* "Director Duties" *2013 76 – 77.* Regal Treasury Bank Holdings was placed in curatorship. The bank failed for numerous reasons i.e. the CEO was not a fit and proper person to hold office; the board of directors was acting in breach of both the Banks Act of 1990 and the Companies Act of 1973 as well as corporate governance principles; and the directors were knowingly parties to the carrying on the business of the bank in a reckless manner.

be; possess and maintain the knowledge and skill that may reasonably be expected of a person holding a similar appointment and carrying out similar functions as carried out by the director, chief executive officer or executive officer of that bank; and exercise such care in the carrying out of their duties in relation to that bank as may reasonably be expected of a diligent person who holds the same appointment under similar circumstances and who possesses both the knowledge and skill mentioned in paragraph (c)[203] and any such additional knowledge and skill as the director, chief executive officer or executive officer in question may have.

Section 77 of the Companies Act of 2008 applies should a banking director or officer fall short of the standard of care, knowledge and skill required of him/her by both the Companies Act of 2008 and the Banks Act of 1990.[204]

Section 60 of the Banks Act applies to directors and other officers of banks. De Jager indicates that this is in accordance with established principles of our common law.[205] This is also the approach followed by the Companies Act of 2008 as sections 76(1), and 77(1) provide for their application to prescribed officers or a person who is a member of a committee of a board of a company or of the audit committee of a board, irrespective of whether or not the person is also a member of the company's board.[206]

The common law used to favour a subjective test in company law, the approach towards this test has changed to where an objective test is being

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[203]Section 60(A)(1A)(c) requires the director to "possess and maintain the knowledge and skill that may reasonably be expected of a person holding a similar appointment and carrying out similar functions as are carried out by the director, chief executive officer or executive officer of that bank".

[204] Dodman D and Graham A "Criminal liability for bank directors? A look at the United Kingdom and South Africa" *Hogan Lovells Africa* Newsletter (April 2013) http://www.hoganlovells.com/criminal-liability-for-bank-directors-a-look-at-the-united-kingdom-and-south-africa-04-09-2015/ (Date of use: 30 August 2018). Section 77 of the Companies Act is discussed above in para 4.2.8 above.

[205] De Jager 2005 *SA Merc LJ* 172.

[206] Discussed above in para 4.2.

preferred.[207] Section 60(1A)(c) and (d) of the Banks Act of 1990 introduces an objective test for both the duty of skill and the duty of care that rests on the managers of a bank.[208] It is also noteworthy that section 60(B) of the Banks Act of 1990 is very clear about the corporate governance processes to be followed by a bank. Section 60B(1) of the Banks Act states that:

> ....notwithstanding anything to the contrary in any law, the board of directors and executive officers of a bank shall establish and maintain an adequate and effective process of corporate governance, which shall be consistent with the nature, complexity and risks inherent in the activities and the business of the bank concerned.

Section 60(B)(2) of the Banks Act of 1990 further provides that the process of corporate governance shall be established with the objective of achieving the bank's strategic and business objectives efficiently, effectively, ethically and equitably within acceptable risk parameters, to ensure compliance with the strategic framework and guidelines established for the bank or controlling company. It also provides for a commitment by the executive officers of the bank to adhere to corporate behaviour that is universally recognised and accepted as correct and proper. There must be a balance of interests of the shareholders and other interested persons who may be affected by the conduct of directors or executive officers of the bank within a framework of effective accountability and proper corporate governance practices. Mechanisms and procedures must be established and maintained to minimise or avoid potential conflicts of interests between the business interests of the bank and the personal interests of directors or executive officers of the bank, and there must be responsible conduct by the directors and executive officers of the bank adversarial. Moreover, this section also provides for the achievement of the maximum level of efficiency and profitability of the bank within an acceptable risk profile for

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[207] See para 4.2.6 above for a discussion on the subjective as well as the objective tests used to determine negligence.

[208] De Jager 2005 *SA Merc LJ* 174. S 60(1A) of the Banks Act of 1990 clearly defines the dimensions of these duties and it furthermore clarifies the ambiguous common law position relating to the relevant applicable test to determine whether or not the duty has been discharged.

the bank; the timely, accurate and meaningful disclosure of matters that are material to the business of the bank or controlling company or the interests of the shareholders of or other persons having an interest in the bank; that the board of directors retains control over the strategic and business direction of the bank, while enabling its executives to manage the bank's operations effectively in achieving the agreed strategic and business objectives; and compliance with all applicable laws and regulations. Unfortunately, the banking environment is also not without corporate failures, despite these measures. If one considers the high level of corporate governance practices that the financial sector is expected to comply with, it concerns that there are still failures in this environment. A recent example is the failure of VBS bank where various allegations of mismanagement, fraud and corruption have been made.[209] The high standard of corporate governance required of banks is justified by their role in the economy. It does, however, confirm the point that overall better governance and accountability must be practised by financial institutions. In the event of a breach of their duties toward the bank, appropriate action must be instituted against the individuals concerned, and they must be held accountable for their actions.

Corporate governance should involve a strong leadership structure, which finds its foundation in integrity, competence, responsibility, accountability, fairness and transparency.[210] This structure should then set the direction for good governance practices at a public higher education institution. The higher education environment, like the banking environment, is unique. Although the banking environment still has failures as indicated above, the failures have been far less than those occurring in companies. The Banks Act of 1990 also goes further than the Companies Act of 2008 and includes

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[209] Omarjee L "VBS Mutual Bank "Severally Mismanaged" – SARB Affidavit" *Mail & Guardian* (date published: 11 April 2018); Thomspon W "VBS Executives may have Stolen 75% of its Assets" 2018-07-10 *Business Day*.

[210] *King IV* principle 1, see in general Wixley T, Everingham G and Louw K *Corporate Governance – The Director's Guide* 5th ed (Siber Ink 2019) 3 – 4.

a compliance function in section 60A and the provisions relating to corporate governance. The author suggests that the Higher Education Act of 1997 should similarly be amended to include statutory provisions to provide for accountability for breaches of fiduciary duties and the duty of care and skill as well as to provide for clear compliance functions and corporate governance. However, it is important, that if these recommendations (as indicated in Chapter 6 below) are indeed included in the Higher Education Act of 1997, institutions must then use them to ensure accountability and proper corporate governance practices.

4.4 CORPORATE GOVERNANCE

4.4.1 Introduction

There is no universal definition of corporate governance.[211] The South African corporate governance regime has its origin in English law. The company law regime of South Africa played a significant role in the development of principles of corporate governance.[212] According to the *Cadbury Report on Corporate Governance* in the United Kingdom, corporate governance is the system by which companies are directed and controlled.[213] Corporate governance relates to the structures and processes associated with the management, decision-making and control in an organisation.[214] Cassim *et al.* suggest that good corporate governance is all

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[211] See the discussion in Chapter 1, para 1.1.1 above. See also Botha 2009 (30) *Obiter* 703; Esser IM and Havenga MK "Shareholder Participation in Corporate Governance" 2008 (1) *Speculum Juris* 74.

[212] Corporate governance addresses the entire span of responsibilities owed by directors of the company to various stakeholders like the shareholders, clients *etc*. Botha 2009 (30) *Obiter* 704.

[213] The Cadbury Report, para 2.5. For more on this report, see https://www.icaew.com/en/library/subject-gateways/corporate-governance/codes-and-reports/cadbury-report (Date of use: 30 August 2018). See Du Plessis JJ "Corporate Governance and the Cadbury Report" 1994(1) *SA Merc Law* 81 – 90.

[214] See Aka PC "Corporate Governance in South Africa: Analyzing the Dynamics of Corporate Governance Reforms in the Rainbow Nation" 2007 *North Carolina Journal of International Law and Commercial Regulation 238*. On corporate governance

about effective and responsible leadership and describe responsible leadership as "having ethical values of responsibility, accountability, fairness and transparency". Furthermore, Du Plessis defines corporate governance as:

> ….the system of regulating and overseeing corporate conduct and of balancing the interests of all internal stakeholders and other parties who can be affected by the corporation's conduct, in order to ensure responsible behaviour by corporations and to create long term sustainable growth for the corporation.[215]

The most important elements of this definition according to Du Plessis are that corporate governance is the system of regulating and overseeing corporate conduct; takes into consideration the interest of internal stakeholders and other parties who can be affected by the corporation's conduct; aims at ensuring responsible behaviour by corporations; and aims at creating long-term, sustainable growth for the corporation.[216] The definition of corporate governance differs from code to code.[217] *King IV*[218] states that "….corporate governance, for the purposes of *King IV*, is about the exercise of ethical and effective leadership by the governing body towards the achievement of the following governance outcomes: ethical culture, good performance, effective control and legitimacy".[219]

To date, there have been four iterations of the *King Code on Corporate Governance*. The *King Code on Corporate Governance (King I)* was published in 1994. This code aimed to create the highest standard of corporate governance in South Africa and resulted in the *Code of*

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generally, see also Botha 2009(30) *Obiter* 704; Du Plessis (ed) *Principles of Contemporary Corporate Governance* 4 – 13; Fombrun CJ "Corporate Governance" 2006 (8) *Corporate Reputation Review* 267 – 269.

[215]Du Plessis (ed) *Principles of Contemporary Corporate Governance* 13.

[216]Du Plessis (ed) *Principles of Contemporary Corporate Governance* 13.

[217]Esser *et al. Corporate Governance Annual Review 2012* 1.

[218] *King IV* is discussed in more detail in para 4.4.3 below.

[219] *King IV* 11.

Corporate Practices and Conduct, which was a recommended set of principles for good governance practices.[220] *King I* was revised and replaced by the second *King Report on Corporate Governance (King II)* in 2002. The third iteration of the *King Report on Corporate Governance (King III)* followed in 2009[221] while the current *King Report on Corporate Governance (King IV)* came into effect on 1 April 2017. The *King Reports* have no statutory effect but offer guidelines for good corporate governance. Internationally, corporate governance is implemented either on a statutory basis or as a result of a code of principles or by a combination of the two. In South Africa, corporate governance is regulated primarily by a code of principles on the one hand, and through incorporating some of the King principles into statutes and stock exchange listing requirements on the other.[222] According to Brink:

> …it can be convincingly argued that self-regulation, in which an organisation voluntarily monitors its own adherence to legal and ethical standards, is far preferable to having an outside agency such as government monitor and enforce those standards. This approach allows organisations to maintain control over the standards to which they are held by successful self-policing themselves. Apart from the bureaucratic burden that would be imposed by external enforcement, the cost of setting up such a mechanism is also avoided.[223]

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[220] See foreword of *King I*. *King I* also included a Code of Ethics for enterprises and all who deal with enterprises, see *King I* 58 – 65. The intention of the code was to raise ethical awareness. See in general, Esser and Delport 2011 (74) *THRHR* 449 – 450; Du Plessis JJ and Low CK (eds) *Corporate Governance Codes for the 21st Century* (Springer International Publishing Switzerland 2017) 245.

[221] See para 4.4.2 for a brief history of the first three *King Reports on Corporate Governance*. The focus of this study is on *King IV*, discussed in para 4.4.3 below.

[222] Compliance with the *King Reports on Corporate Governance* is mandatory for any company wishing to list on the Johannesburg Stock Exchange (JSE). For the JSE listing requirements, https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE%20Listings%20Requirements.pdf (Date of use: 28 October 2018).

[223] Management today "Corporate Governance and the Companies Act" October 2009 6.

The *King Reports* point out that there is a link between governance and compliance with law as governance in isolation would be impossible.[224] Good governance is not something that exists separately from the law, and it is entirely inappropriate to divorce governance from law. Corporate governance chiefly involves the establishment of structures and processes with appropriate checks and balances that enable directors to discharge their legal responsibilities and oversee compliance with the law. *King IV* states that those charged with governance should ensure that compliance is understood, not only for the obligations that it creates but also for the rights and protections that it affords. A holistic view is needed of how applicable laws, non-binding rules, codes and standards related to one another. This includes how corporate governance principles relate to relevant legislation.[225]

Over the years, South Africa has experienced several corporate failures which were mainly caused by ineffective corporate governance. Some of these corporate failures occurred before the publication of *King I*[226] while others occurred after its publication.[227] Both the LeisureNet and Fidentia corporate collapses were indicative of the fact that corporate governance in South Africa still needed improvement.[228] The recent Steinhoff International

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[224] *King I* do not make this link. However, in *King II* 9, various important legislation that was enacted after *King I* is discussed. *King III* 7 - 8 confirms the link between good governance and compliance. *King IV* 30.

[225] *King IV* 13.

[226] One of these corporate failures was Masterbond (1991).

[227] A few of these corporate failures were Regal Treasury Private Bank Ltd (2001), Macmed Health Care Ltd (1999), LeisureNet (2000), Saambou Bank (2002) and Fidentia (2007), Naspers (2017), KPMG (2018). See in general, Otty R "King III and the Companies Act: Director's and Officer's Liability" 2009 (8) *Enterprise Risk* 8; Rossouw J "Steinhoff Scandal Points to Major Gaps in Stopping Unethical Corporate Behaviour" 2017-12-17 *The Conversation*; Donnelly L "KPMG Woes Deepens after VBS Bank scandal"2018-04-15 *Mail & Guardian*); Macharia J "KPMG welcomes Review and Owns up to Failings" 2018-05-07 *Sunday Times*; Cotterill J "McKinsey, KPMG Accused of Criminal Breaches over South Africa Gupta Scandal" 2018-01-17 *Financial Times*.

[228] See in general, Mlambo C *The Influence of Corporate Failures and Foreign Law on South African Corporate Governance* (Published LLM thesis University of Pretoria 2016) 41; Van der Walt AWAJ *et al.* "An Analysis of the Prominence of Corporate

N.V.[229] corporate governance collapse is one of the biggest corporate failures to date in South Africa and has been compared to the Enron failure in the USA.[230]

The Steinhoff scandal reiterates the need for the accountability of directors and auditors as well as the improvement of corporate governance and the audit function in South Africa. Despite what is internationally regarded as a high-quality governance code, the large number of corporate scandals, , is concerning and begs the question whether or not South Africa should still

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Governance in South African Media for the Period 1990 – 2012" 2015 (59) *The Journal of Corporate Citizenship* 177.

[229] Registered in the Netherlands, Steinhoff is a limited liability company in terms of the Netherlands Civil Code. Accordingly, the company has a two-tier board. This means that one board is the supervising board and the other is the managing board. It seems that Steinhoff was the only company in South Africa that had this unique board structure. See Styan JB *Steinhoff en die Stellenbosse Boys* (Lapa Uitgewers South Africa 2018) for an investigative perspective on the Steinhoff scandal.

[230] Steinhoff is listed on the JSE and therefore had to comply with the JSE listing requirements. It is also registered as an external company in terms of s 23 of the Companies Act of 2008. Therefore, unless a section of the Companies Act specifically states that it is applicable to external companies, it will not be. The company would therefore be subject to Book 2 of the Dutch Civil Code. This accounting scandal has raised major concerns with regards to corporate governance in South Africa and internationally. The company was accused of overstating its earnings, amongst other accounting irregularities. German prosecutors confirmed that they were investigating Markus Jooste (CEO) and other senior officials for accounting fraud. Many questions were raised as to how the JSE, investors, asset managers, fund managers and even directors could have missed the impending collapse when there were so many warning signs. Another important question is why neither the audit committee nor the external auditors picked up any dubious accounting practices? It became apparent that the chairperson of the audit committee of Steinhoff was also part of its executive management. *King IV* clearly states that this should not be the case as it is a requirement that the chairperson of an audit committee be independent. Deloitte was Steinhoff's auditors for more than 20 years and provided Steinhoff with a "clean" and unqualified audit for the 2015/2016 financial year. However, Deloitte, declined to sign off the 2017 financial statements after the scandal broke. See in general, Rossouw J "Steinhoff Scandal Points to Major Gaps in stopping Unethical Corporate Behaviour" *The Conversation* (date published: 17 December 2017) https://theconversation.com/steinhoff-scandal-points-to-major-gaps-in-stopping-unethical-corporate-behaviour-88905. See Chapter 5, para 5.2.4 below for a discussion of Enron. See Rossouw J "Steinhoff's Board Behaved Badly. Why it needs to be held Accountable." 2018-04-08 *The Conversation*https://theconversation.com/steinhoffs-board-behaved-badly-why-it-needs-to-be-held-to-account-94129; according to Styan, Steinhoff declared in its 2015 prospectus that their collective tax rate for 2012 was only 11%, in 2013 it was 12,3% and 2014 it was 15,7%. This is in sharp contrast to the South African corporate tax rate of 28%. Reuters "German Prosecutors investigate Steinhoff CEO" 2017-08-24 *Manager Magazine*.

follow the "soft approach" in the form of voluntary corporate governance codes or should rather have legally enforceable statutory regulation.

4.4.2 Overview of the South African *King Reports on Corporate Governance*

As mentioned above, *King I*[231] was published in 1994 by the Institute of Directors (IoDSA) as a result of the increase of failing entities internationally[232] and locally,[233] increased corruption and the dire need of regulation of corporate governance. *King I* was the first corporate governance code published in South Africa. Compliance with the Code was voluntary, and there were no severe consequences for non-compliance. *King I* was revised and replaced in 2002 with *King II*.[234] Neither *King I* nor

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[231] Compliance with *King I* was voluntary and its principles applied to listed companies on the Johannesburg Stock Exchange (JSE), large public entities as defined in the Public Entities Act 93 of 1992, banks, financial and insurance entities as defined in the Financial Services Act as well as large unlisted public companies, see *King I* 5. The King Committee was headed by former High Court judge, Mervyn King S.C. *King I* was drafted to assist companies and their directors by providing a set of principles and guidelines to clarify the existing common law principles regarding corporate governance. See in general, Mlambo *The Influence of Corporate Failures and Foreign Law on South African Corporate Governance* 42 – 44; Van der Walt *et al.* 2015 *The Journal of Corporate Citizenship* 177; West A "Theorizing South Africa's Corporate Governance" 2006 *Journal of Business Ethics* 455; Carciumaru LM *An Assessment of the Impact of Corporate Governance Codes and Legislation on Director's and Officer's Liability Insurance in South Africa* (Published Master of Commerce thesis University of the Witwatersrand 2009) 115 – 117.

[232] Australia and the United States of America experienced major corporate collapses through mismanagement during the 1980s, for example the Bond Corporation Group of Companies and Enron. For these and other examples, see Cassidy J "Models for Reform: The Director's Duty of Care in a Modern Commercial World" 2009 (20) *Stellenbosch Law Review* 373.

[233]These corporate failures are briefly mentioned above in para 3.3.2(b).

[234] *King II* was applicable to JSE-listed companies, banks, financial institutions and public sector enterprises. It did, however, state that other entities should "give due consideration to complying with *King II*," see *King II* 21. See in general Rossouw GJ "The Philosophical Premises of the Second King Report on Corporate Governance" 2005 (70) *Koers* 745 – 748; Rossouw GJ "Business Ethics and Corporate Governance in the Second King Report: Farsighted or futile?" 2002 (67) *Koers* 405 – 419; Bekink 2008 (20) *SA Merc LJ* 107 – 110; Mlambo *The Influence of Corporate Failures and Foreign Law on South African Corporate Governance* 44; Carciumaru *An Assessment of the Impact of Corporate Governance Codes and Legislation on Director's and Officers' Liability Insurance in South Africa* 128 – 130.

King II dealt with the codification of directors' duties in any detail.[235] Non-compliance with the recommendations of *King II* could result in secondary liability, such as sanctions by the Johannesburg Stock Exchange (JSE) in respect of aspects that had been included in the *JSE Listings Requirements*,[236] but not necessarily in direct liability.[237]

King III followed in 2009 and was aligned with the Companies Act 71 of 2008.[238] This version of the Code was prompted not only by the significant changes in South African company law introduced by the Companies Act of 2008 but also by changes in international governance trends.[239] The Companies Act of 2008 had incorporated into statute several crucial corporate governance matters. The 2008 Act specifically encourages transparency and high standards of corporate governance[240] while its

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[235]Esser *Recognition of Various Stakeholder Interests in Company Management* 295 – 296. For more on the history of the King Reports, see in general, *Director's Standard of Care, Skill and Diligence and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future Implications for Corporate Governance* 30 – 36.

[236] Kemp-Mans N, Erasmus P and Viviers S "Advances in the Corporate Governance Practices of Johannesburg Stock Exchange Companies" 2016 (20) *Southern African Business Review* 71 – 89; Du Plessis *et al. Principles of Contemporary Corporate Governance* 393. The JSE is a self-regulating organisation, and its powers are derived from the Financial Markets Act 19 of 2012. However, the powers of the JSE are limited to matters included in the listing requirements. See JSE "Understanding JSE Investigations and Imposition of Censures" https://www.jse.co.za/content/JSEEducationItems/CensuresBrochure.pdf (Date of use: 15 February 2018) for the JSE listing requirements, p see https://www.jse.co.za/content/JSEEducationItems/Service%20Issue%2017.pdf (Date of use: 13 September 2016).

[237] Esser and Delport 2011(74) *THRHR* 449.

[238] For a comparison between *King III* and *King II*, see Muwandi T *Comparison of King III and King II and the implications of King III* (Published MBA thesis University of Stellenbosch 2010) 1 – 107. See also Mallin CA (ed) *Handbook on International Corporate Governance: Country Analyses* (Edward Elgar Publishing Limited 2006) 396 – 399; Du Plessis *et al. Principles of Contemporary Corporate Governance* 394 – 396.

[239]*King III* 5; Wiese *Corporate Governance in South Africa: With International Comparisons* 19; Cassim *et al. Contemporary Company Law* 474.

[240] S 7(b)(iii) of the Companies Act of 2008.

predecessor, the Companies Act 61 of 1973 did not expressly deal with corporate governance issues in detail.[241]

King III applied to all entities,[242] regardless of the manner and form of incorporation or establishment, whether in the private, public or non-profit sectors, thereby also making it applicable to higher education institutions.[243] *King IV* provides some sector-specific supplements. It is recommended that a sector supplement be developed for the higher education sector.[244] As indicated above, the various independent assessor reports of the troubled higher education institutions indicate that there has been a lack of proper governance.[245]

King III moved away from the "comply and explain" method used in *King II* and introduced the "apply or explain"[246] method in its place.[247]

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[241] See in general, Cassim *et al. Contemporary Company Law* 474. Muwandi *Comparison of King III and King II, and the implications of King III* 1; King M "The Synergies and Interaction between *King III* and the Companies Act 61 of 2008" 2010 *Acta Juridica* 446.

[242] *King III*17.

[243]The main aspects of *King III* were effective leadership, sustainability and corporate citizenship. *King III* dealt with various matters including sustainability, inclusive stakeholder approach, integrated reporting, alternative dispute resolution, risk-based internal audit, shareholders and remuneration as well as the evaluation of board and director performance. *King III* also introduced information technology governance and business rescue proceedings. See *King III*11, 16; Chapter 5 and 104 – 105; *King III* consisted of two documents, one being the code of governance (the Code) which contains the principles of *King III,* and the report, which provides recommendations on best practice; Muwandi *Comparison of King III and King II, and the implications of King III* 1.

[244] *King IV* is discussed in detail section 4.4.3 below.

[245] See Chapter 3, para 3.3.2(b) for a discussion of higher education institutions placed under administration.

[246] The "apply or explain" method is a refinement of the "comply or explain" method. See Esser and Delport 2011 *THRHR* 450. The "comply or explain" method used in *King II* was applied mainly by listed companies in compliance with the listing requirements. This resulted in companies reporting on certain principles, either with which they agreed with or could afford, but not with all the principles. These companies then have to explain why they did not comply with certain principles.

[247] This is discussed in detail in para 4.4.3 below. See in general Du Plessis and Low (eds) *Corporate Governance Codes for the 21st Century* 252 – 254.

4.4.3 *King IV*

Various developments in corporate governance since the implementation of *King III* necessitated its revision. Fundamental changes had occurred in both business and society, which influenced *King IV*. Numerous requests were also received by the King Commission to draft *King IV* in such a way that it would be more applicable to all organisations and not only companies.[248] The previous *King Reports* all had their foundation in ethical and effective leadership, and *King IV* confirms this. *King IV* has several objectives.[249] Although it refines several of the concepts used in *King III*, it does not depart significantly from the philosophical underpinnings of *King III*.[250] However, the emphasis in *King III* was on input, whereas *King IV* is on output. Output refers to the products, services, by-products and waste that are produced by an organisation.[251] The legal status of *King IV*, as with its predecessors, is that of a set of voluntary principles and leading practices.[252] However, according to Delport, non-compliance with the King Code might have an impact on the liability of directors.[253] *King IV* confirms

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[248] *King IV* 3; 6.

[249] *King IV* 22. They include: promoting good corporate governance as integral to running a business or enterprise and delivering benefits such as an ethical culture; enhancing performance and value-creation by the organisation; enabling the governing body to exercise adequate and effective control and building and protecting trust in the organisation, and its reputation and legitimacy; broaden the acceptance of good corporate governance by making it accessible and fit for application by organisations of a variety of sizes, resources and complexity of strategic objectives and operations; reinforce good corporate governance as a holistic an inter-related set of arrangements to be understood and implemented in an integrated manner; and present good corporate governance as concerned with not only structure and process, but also an ethical consciousness and behavior

[250] *King IV* 6. These philosophical underpinnings are ethical and effective leadership.

[251] *King IV* 15.

[252] Van Tonder *Obiter* 2018 307.

[253] See in general, Delport *The New Companies Act Manual* 93; Van Tonder *Obiter* 2018 307. In *Brehm v Eisner* 746 A.2d 244 (Del 2000) 256 (United States) states the following: "(a) aspirational ideals of good corporate governance practices of directors that go beyond the minimal legal requirements of the corporation law are highly desirable, often tend to benefit stockholders, sometimes reduce litigation and can

that the governing body is the focal point of corporate governance in an organisation and therefore, the primary audience of *King IV*.[254] Specific features that distinguish it from its predecessors are the outcomes-based approach; clear differentiation between principles and practices; its design and drafting to enhance user accessibility: and the reinforcement of governance as a holistic and integrated set of arrangements. Broader terms are used in *King IV*, namely "organisations", "governing body", and "those charged with governance duties" rather than more specific company law terminology, confirming its general application.[255] The broader reach of the report is demonstrated by the inclusion of the sectorial supplements in *King IV* that assist organisations across a variety of sectors and organisational types to interpret and implement its provisions. It provides guidance on how to apply the recommended practices proportionally in line with the organisation's size and resources and the extent and complexity of its activities. In order to balance its less prescriptive approach, there is a greater emphasis on transparency concerning how judgment is exercised when considering the practice recommendations contained in *King IV*.[256]

An "apply and explain" approach is advocated to reinforce this qualitative interpretation of the principles and practices of *King IV*, in contrast to the "apply or explain" approach of *King III*. The "apply and explain" application regime refers to applying the principles and explaining how they are being affected.[257] All principles are phrased as aspirations and ideals that

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usually help directors avoid liability. But they are not required by the corporation law and do not define standards of liability."

[254] *King IV* 35.

[255] *King IV* 6.

[256] *King IV* 27; Accounting Weekly "King IV: Friend or Foe to the Non-Profit Sector in South Africa" April 2017 https://accountingweekly.com/KING-IV-FRIEND-FOE-NON-PROFIT-SECTOR-SOUTH-AFRICA/ (Date of use: 1 November 2018.

[257] *King IV* 27; 37. These aspirations and ideals are basic to good governance and application of principles is therefore assumed. The explanation that is required is a high-level disclosure of the practices that have been implemented and the progress made on the journey towards giving effect to each principle. Maharaj A & Combrink J "King IV – The why, the what and the what now? Mazars

organisations should strive towards on their journey to achieve good governance outcomes.[258] *King IV,* as does *King III*, confirms that there is an argument against the mandatory "comply or else" framework and that a "one size fits all" approach is not suitable, as the types of business and enterprises carried out by organisations, and the sizes of the enterprises themselves, are so varied. There is also a danger that the governing body may become focused on compliance instead of applying its mind to the best governance practice for the particular issue before it.[259]

King IV follows the same tradition as the previous *King Reports* in preferring a stakeholder-inclusive model[260] that requires the governing body

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https://www.mazars.co.za/Home/News/Articles/KING-IV-THE-WHY-THE-WHAT-AND-THE-WHAT-NOW (Date of use: 1 November 2018); Wiese *Corporate Governance in South Africa with International Comparisons* 22.

[258] In following the "apply or explain" method, the board of directors, in its collective decision making, could conclude that to follow a recommendation would not, in the particular circumstances, be in the best interest of the company. The board could decide to apply the recommendation differently or apply another practice and still achieve the objective of the overarching corporate governance principles of fairness, accountability, responsibility and transparency. Explaining how the principles and recommendations were applied, or if not applied the reasons, results in compliance. See in general, Walker D and Meiring I "King Code and developments in corporate governance" 2010 *Without Prejudice* 36 – 38; Du Plessis and Low (eds) *Corporate Governance Codes for the 21st Century: International Perspectives and Critical Analyses* 252 – 254; The focus then shifted from compliance with the King code of practice for large JSE listed companies to also include compliance by small companies and other enterprises like higher education institutions. See *King III* 7; Du Plessis *et al. Principles of Contemporary Corporate Governance* 397.

[259] *King IV* 7; 37. Practices are meant to be proportionally applied taking the following into account in relation to the organisation: size of turnover and workforce; resources; and complexity of strategic objectives and operations. The smaller and less complex an organisation, the more it should consider recommended practices proportionally according to the scale of its operations. Organisations that are by nature and in terms of objectives of public interest, should aspire to a higher level of application of good governance practices as recommended in *King IV*. Application on a proportional basis is subject to legislative requirements. See in general Wixley, Everingham and Louw *Corporate Governance* 16.

[260] In the stakeholder-inclusive model, the best interests of the company are not necessarily equated to the interests of shareholders, and shareholders do not have predetermined precedence over other stakeholders. The interests of shareholders or any other stakeholder grouping may be afforded precedence, based on what is believed to serve the interests of the organisation at a point in time and depending on the circumstances. See in general, Esser IM "A Global Perspective on African Corporate Governance: The Protection of Stakeholders' Interests" 2007 *South African Yearbook of International Law* 406 – 429; Esser IM and Delport P "The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom's Enlightened

to consider, weigh and balance the legitimate needs, interests and expectations of all material stakeholders in making decisions in the best interests of the organisation.[261] *King IV* contains 17 principles instead of the 75 principles of *King III*, making it a more practical and concise document.[262] The reason for this much shorter document can be explained in part by the fact that many of the *King III* principles are now contained in the legislation. There is no need to duplicate them in *King IV*, as corporate governance and legislation are integrated, and do not operate in isolation.[263] However, certain principles contained in *King III* are not included in *King IV,* nor are they dealt with in legislation.[264]

The main difference between the application regime of *King III* and *King IV* is that the application or adoption of the principles is assumed in *King IV.*[265] The main objective of *King IV* is to broaden acceptance of corporate governance by making it accessible and fit for application across sectors, organisations and entities of varying sizes, resources and complexity of strategic objectives and operations.[266] *King IV* also supports integrated reporting instead of silo reporting.[267] Integrated reporting promotes a more cohesive and efficient approach to corporate reporting.[268] According to King:

Shareholder Value Approach: Part 1" 2017 (50) *De Jure* 104 – 110; Esser IM and Delport P "Shareholder Protection Philosophy in terms of the Companies Act 71 of 2008" 2016 *THRHR* 4 – 18; Du Plessis JJ "Corporate Social Responsibility and "Contemporary Community Expectations" 2017 (35) *Company & Securities Law Journal* 30 – 46.

[261] *King IV* 25.

[262] *King IV* 7.

[263]For example, business rescue is now provided for in the Companies Act of 2008.

[264] For instance, principle 2.20 of *King III* states that the induction and ongoing training and development of directors should be conducted through formal processes. In the author's view, this important provision should have been retained in *King IV*.

[265]*King IV* 27.

[266] *King IV* 22.

[267] According to *King IV*, the traditional financial reporting system was a good development at the time. However, since then it has had to respond to market regulators, standard boards and complex legislation. The view is now that while

> …an integrated report provides insight into the organisation's strategic objectives and how those objectives relate to its ability to create and sustain value over time and with the resources and relationships on which the organisation depends……an integrated report also includes the board's expectation about the future, as well as other information to assist readers of the report to understand and make informed assessments about the company's prospects and whether it will sustain value creation.[269]

The International Integrated Reporting Council (IIRC)[270] published its International Integrated Reporting Framework (IIRF) in 2013.[271] *King IV* was endorsed by the Integrated Reporting Committee (IRC) of South Africa.[272] In terms of *King IV*, an organisation's integrated report is one of many reports that an organisation may issue to indicate its compliance with legal requirements. The integrated report issued by the organisation must enable the organisation's stakeholders to make informed assessments about the organisation's progression.[273]

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audited financial statements are crucial, they are insufficient to discharge the duty of accountability. See *King IV* 5.

[268] International Integrated Reporting Council (IIRC) *International Integrated Reporting Framework* 4. This framework serves as a guidance to organisations on how to prepare their integrated report.

[269] Esser and Havenga (eds) *Corporate Governance Annual Review 2012* 13. See in general on integrated reporting, Cassim *et al. Contemporary Company Law* 503 – 504; Hendrikse and Hefer-Hendrikse *Corporate Governance Handbook: Principles and Practice* 451 – 464; Naidoo *Corporate Governance: An Essential Guide for South African Companies* 275 – 285; Wiese *Corporate Governance in South Africa with International Comparisons* 171 – 175: Du Plessis and Low (eds) *Corporate Governance Codes for the 21st Century* 256.

[270] See http://integratedreporting.org/the-iirc-2/ for more on the IIRC (Date of use: 22 March 2018); Wiese *Corporate Governance in South Africa with International Comparisons* 173 - 174.

[271] For more on this framework, see http://integratedreporting.org/wp-content/uploads/2015/03/13-12-08-THE-INTERNATIONAL-IR-FRAMEWORK-2-1.pdf (Date of use: 22 March 2018).

[272] *King IV* 28; http://integratedreportingsa.org/ (Date of use: 22 March 2018). See IRC "Disclosure of Governance Information in the Integrated Report: An Information Paper" 2017.

[273] *King IV* 48

As was mentioned above, *King IV*[274] includes sectoral supplements[275] that provide specific guidance to specific categories of organisations and sectors, in addition to the traditional audience of listed, public and large private companies. The current supplements cater for small and medium enterprises (SMEs),[276] non-profit organisations,[277] state-owned entities,[278] municipalities[279] and retirement funds.[280] These sectoral supplements should not be used on their own but should be read in conjunction with the rest of *King IV*.[281]

The *2014 Reporting Regulations* applicable to public higher education institutions support good governance practices. These regulations are outdated as they are based on *King III*, but it is envisaged that this will be addressed by the DHET in the near future.

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[274] *King IV* is the first of the South African corporate governance codes to use sectoral supplements.

[275] *King IV* 75 - 117. The sector supplements provide the applicable terminology and address the governance challenges and considerations of that sector. In respect of all categories of organisations and sectors, the essence of the *King IV Code*, namely the governance outcomes and principles, hold true. The principles and outcomes are therefore carried forward to each of the supplements with the necessary changes in terminology. It is only at the level of practice that the different categories of organisations are distinguished. Small and medium sized companies also generally still share the view that corporate governance is not applicable to them. Despite King III's holistic principle-based approach, some non-profit organisations deemed it unachievable due to a lack of resources to meet requirements that are in fact intended for a large and complicated structures. *King IV* aims to change that by including the sectoral sectors to assist specific sectors in achieving good governance.

[276] *King IV* 103 – 110. A Small Medium Enterprise (SME) is formally recognised in the National Small Business Act 102 of 1996.

[277] *King IV* 87 – 94. This can be a charity, club, charitable trust, association or a non-profit organisation in terms of the Non-profit Organisations Act of 1997.

[278]*King IV* 111 – 117. This applies to all entities as listed in schedule 2 and 3 of the Public Finance Management Act of 1999.

[279] *King IV* 79 – 86.

[280] *King IV* 95 – 102.

[281] *King IV* 75. USAf has confirmed that it was approached by the King Commission to assist in drafting a sectorial supplement for higher educations. USAf agreed to assist and the first draft is underway.

The discussion below focuses on some important principles of *King IV* that are, in the author's view, relevant and important in the higher education sector.

(a) Leadership, ethics and corporate citizenship

The principles of leadership, ethics and corporate citizenship are dealt with in part 5.1 of *King IV*.[282] Principle 1 provides that the governing body should lead ethically and effectively.[283] The principle requires members of the governing body to act in good faith and in the best interests of the organisation.[284] This is especially important when it comes to the higher education environment. Public higher education institutions receive public money, and therefore public accountability is essential. One of the characteristics of this principle is transparency.[285]

Principle 2 provides that the governing body should govern the ethics of the organisation in a way that supports the establishment of an ethical culture.[286] This principle, amongst other things, recommends that all

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[282] *King IV* 43 – 46.

[283] Members of the governing body should in their decision-making and exercise of duties demonstrate the following individual and collective ethical characteristics: independence, inclusivity, competence, diligence, being informed and courage. *King IV* 43.

[284] *King IV* 43; recommended practice 1 – 3.

[285] *King IV* 44; recommended practice 1.

[286] *King IV* 44; recommended practices 4 – 10. This is an important principle, especially for higher education institutions. It prescribes that a governing body should ensure that the necessary structures are in place to give effect to the organisation's ethics, values and norms, which must include reporting mechanisms and appropriate oversight and resources of ethics management. The governing body should oversee that there are processes in place to ensure that employees, business associates, contractors and suppliers are familiar with the organisation's ethics as stipulated in a code of ethics. Compliance with this code must be monitored and there should be disclosure of the structures and processes that have been put in place for ethics management; key focus areas during the reporting period; and mechanisms for monitoring and assessing effectiveness, *King IV* 34. The governing body should provide clear strategic direction on the management of the organisation's ethics. The governing body should ensure that an ethics policy encompasses the relationship with both internal and external stakeholders, including the conduct of organisations within the supply chain and

organisations approve codes of conduct and ethics policies and procedures for their specific organisations.[287] The independent assessors' reports of the various institutions that were investigated, as discussed above, are indicative of the fact that some higher education institutions do not yet reach the required standard.[288] Improving the ethical conduct of higher education institutions should be of the utmost importance, and proper measures should be implemented in the event of the contravention of the ethical policies and procedures.[289] Therefore, it is a recommendation that all public higher education institutions have approved codes of conduct and ethics policies and procedures that are implemented and enforced throughout the institution.[290] These codes and policies should also be available to the public to ensure transparency.

(b) Governing structures and delegation

King IV contains five important principles with regard to governing structures.[291] Principle 6 holds that the governing body should serve as the focal point and custodian of corporate governance in the organisation. The governing body should exercise its leadership role by steering the organisation and determining its strategic direction; approving policies and planning that give effect to the direction provided; overseeing and

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addresses the particular ethical risk profile of the organisation. The governing body should oversee that there are processes in place to ensure that employees, business associates, contractors and suppliers are familiar with the organisation's ethical norms as detailed in a code of ethics and conduct – for example incorporating them into employment and supply contracts. *King IV* furthermore recommends disclosure of the structures and processes that have been put in place for ethics management, key focus areas during the reporting period and mechanisms for monitoring and assessing effectiveness.

[287] *King IV* 44; recommended practice 5.

[288] These independent assessors' reports are discussed above in Chapter 3, para 3.3.2(b). See the suggested recommendations in Chapter 6, para 6.3 and 6.4 below.

[289]See the suggested recommendations in Chapter 6, para 6.3 and 6.4 below.

[290] These ethics policies must include an effective research ethics policy.

[291] *King IV* 49 – 60.

monitoring of implementation and execution by management; and ensuring accountability for organisational performance by means of, among others, reporting and disclosure. This principle reflects the fact that ethical leadership is key to the implementation of good governance in public higher education institutions.[292] In the author's opinion, effective corporate governance practices should be implemented at all public higher education institutions. It is not suggested that these institutions should focus on mindless compliance; instead, they should develop and implement a corporate governance strategy suitable for their specific institution. Each institution must have strong and ethical leadership that sets the direction of good corporate governance practices.

According to principle 7, the governing body should strike a balance between knowledge, skills, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively.[293] Each higher education institution must, therefore, assess its knowledge pool and, in the event of an opening in its Council, the institution must require a minimum skill-set to ensure that it is able to rely on a good range of expertise. It is a recommended practice that the governing body should have a majority of non-executive members, most of whom should be independent.[294] The independence of non-executive members increases the likelihood that decisions will be made in the best interests of the organisation instead of favouring personal or other interests.[295] This principle is enforced in section 27(6) of the Higher Education Act of 1997.[296]

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[292] *King IV*; recommended practice 1 – 5.

[293] *King IV* 50 – 53; recommended practices 6 – 38.

[294] *King IV* 50; recommended practice 8.

[295] *King IV* 50.

[296] Section 27(6) confirms that at least 60% of the members of a Council must be persons who are not employed by, or students of, the public higher education institution concerned.

Principle 8 confirms that the governing body should ensure that its arrangements for delegation within its own structures promote independent judgment and assist with the balance of power and the effective discharge of duties.[297] Each institution must ensure that its delegation of authority is revised annually and made publicly available.[298] Although *King IV* recommends specific committees which must be provided for, it is at the discretion of the board to appoint other committees. The committees included in *King IV* are the audit, risk governance, remuneration, nomination and social and ethical committees.[299] The role of committees is vital in any organisation, especially in public higher education. The *2014 Reporting Regulations* provide for certain committees to be constituted, and it is at the discretion of each institution to constitute others.[300] The structure, composition and mandate of each committee are essential and must be considered carefully. Committees should not merely be constituted for the sake of having committees. Their function and mandate need to be clear. Therefore, in the view of the author, each public higher education institution should provide for its committees, their composition and mandate in its institutional statute.[301] The delegation of authority of each institution

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[297] *King IV* 54 – 57; recommended practices 39 – 70. The terms of reference should, at a minimum, deal with the following: the composition of the committee and, if applicable, the process and criteria for the appointment of any committee members who are not members of the governing body; the committee's overall role and associated responsibilities and functions; delegated authority with respect to decision-making; the tenure of the committee; when and how the committee should report to the governing body and others; the committee's access to resources and information; the meeting procedure; and the arrangements for evaluating the committee's performance.

[298] It is up to each institution to have a delegation of authority approved by its Council, as Council has the power to delegate its functions. It is important that a delegation of authority deal with all relevant matters like tenders, any matters with financial implications, lease agreements and any other contracts with or without monetary value. It is also important to deal with other matters like decision-making in the academic environment and the commercial domain of the institution.

[299] *King IV* 54 – 57; recommended practices 51 – 70.

[300] See para 4.4.4 below for a discussion of the committees as contained in the *2014 Reporting Regulations*.

[301] See Chapter 6, para 6.3.2 below for the recommendations in this regard. Section 29 of the Higher Education Act of 1997 confirms that each institution may (not must) establish committees to perform any of their functions and may appoint persons, who

should provide for the accountability of individuals who do not follow the policies and processes in order to fulfil the mandate of each committee.[302] For some companies, an audit committee is a statutory requirement.[303] *King IV* recommends that any governing body of any organisation which issues audited financial statements should establish an audit committee.[304] *King IV* further states that the role of the audit committee[305] should be to provide independent oversight of, amongst others, the effectiveness of the organisation's assurance functions and services, with a particular focus on combined assurance[306] arrangements, including external assurance service providers, internal audits and the finance function. Also included is the integrity of the annual financial statements and, insofar as they are delegated by the governing body, other external reports issued by the organisation.[307] The audit committee holds decision-making power and

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are not members of the Council or the Senate, as the case may be, as members of such committees.

[302]Committees are also included in the Companies Act of 2008. Section 72 states that except where the Memorandum of Incorporation provides otherwise, the board may appoint any number of committees and may provide these committees with a relevant mandate.

[303] These companies include banks in accordance with s 64 of the Banks Act of 1990, a public company, a state-owned entity and any company, which has indicated in its Memorandum of Incorporation that the company must have an audit committee. Section 94 of the Companies Act of 2008.

[304] *King IV* 55, recommended practice 51.

[305] Section 94 (7) of the Companies Act of 2008 lists the duties of auditors; *King IV* 55; recommended practices 52 – 59. See Braiotta L, Gazzaway RT and Colson R *The Audit Committee Handbook* 5th ed (Wiley New Jersey 2010) 1 – 403 for more on the audit committee, its structure, functions and responsibilities.

[306] *King IV* 55; recommended practice 51. See in general, Schreurs HC and Marais M "Perspectives of Chief Audit Executives on the Implementation of Combined Assurance" 2015 (17) *SAJAAR* 73-86. In a combined assurance model, some of the lines of assurance, such as internal audit and risk and compliance operate across a broad spectrum of the business. An internal audit, as part of the third line of assurance, remains pivotal to corporate governance. See *King IV* 55 and s 94 of the Companies Act of 2008, which makes provision for the establishment and management of an audit committee. See Ferreira 2008 *Meditari Accountancy Research* 89 – 106; Marx B and Lubbe D "The Role of the Audit Committee in Supporting the External Auditor's Independence and Effectiveness" 2010 (8) *JNGS* 86 – 106; Marx and Van der Watt 2011 *JNGS* 56 – 71 in this regard.

[307] *King IV* 55, recommended practice 51. See in general, Ferreira I "The Effect of the Audit Committee's Composition and Structure on the Performance of Audit

accountability for statutory duties.[308] *King IV* recommends that the audit committee disclose the date of the first appointment of the auditing firm. In the interests of the quality of the audit, *King IV* furthermore recommends that the audit committee disclose significant audit matters that arose from the audit and how these matters are addressed by the audit committee.[309] The *2014 Reporting Regulations* require that each public higher education institution should have an audit committee.[310] The general functions of an audit committee within the higher education environment include *inter alia* the following: To ensure that internal control systems, information systems, accounting practice, internal and external financial reporting, enterprise risk management and corporate governance of the institution are continuously adequate and effective; assessing the effectiveness of accounting and internal control systems; to establish an independent internal audit function, with formal terms of reference, purpose and delegation of authority; and to establish an effective external audit function with clear terms of reference and mandate.[311]

King IV also recommends the establishment of a committee responsible for nominations of members of governing bodies. This committee shall be responsible for making recommendations on the appropriate composition,

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Committees" 2008(20) *Meditari Accountancy Research* 89 – 106; Marx and Lubbe 2010(8) *JNGS* 86 – 106. Also see Marx B and Van der Watt B "Sustainability and Integrated reporting: An Analysis of the Audit Committee's oversight role" 2011(9) *JNGS* 56 – 71; Adelopo I, Aras G and Crowther D *Corporate Social Responsibility: Auditor Independence: Auditing, Corporate Governance and Market Confidence* (Routledge United Kingdom 2012) 76 – 88; 91 – 94 and 105 – 125 for more on audit committees and their independence.

[308] *King IV* 33; 55, recommended practice 54.

[309] *King IV* 55 – 56, recommended practice 59. This recommendation is in line with the rule by the Independent Regulatory Board for Auditors, which was published on 4 December 2015. See https://www.bdo.co.za/getattachment/7309a39b-d00e-40f7-96c9-6cbacec695d4/attachment.aspx (Date of use: 30 August 2018).

[310] *2014 Reporting Regulations* 24 – 26. For a discussion of the *2014 Reporting Regulations* and the audit committee, see section 4.4.5 below.

[311] Information compiled by reviewing the charters of three public higher education institutions. See in general, Committee of University Chairperson (CUC) *Handbook for Members of Audit Committees in Higher Education Institutions* 2008 1 – 141.

succession, performance and effective function of the institution and its various committees.[312] This type of committee is essential for public higher education institutions, as many nominations take place within a public higher education institution, i.e. Council and Senate. The *2014 Reporting Regulations* do provide for a Council Membership Committee, which must consider nominations for vacancies on the Council.[313] The Council and Senate committees play a significant role in institutions, as they assist and advise the Council and Senate on various matters. A committee responsible for nominations and elections considers nominations and elections of various positions on these committees. It is this committee's responsibility to ensure that persons with the required skills are elected for these positions to ensure optimal functioning of these committees. The committee is also able to consider diversity in its committee compositions in a holistic manner.

In addition, the governing body should also consider establishing a committee to assist it with the governance of risk.[314] The *2014 Reporting Regulations* require that such a committee be established, whether as a standalone committee or as part of a combined audit and risk committee. If it is part of a combined committee, the agenda of the meetings addressing risk, audit and opportunity should be kept separate.[315] The risk committee must consider all issues of risks, not only financial risks of the institution

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[312] *King IV* 56 – 57, recommended practice 60 – 61. All members of the committee for nominations should be non-executive members of the governing body and the majority should be independent.

[313] At this juncture it should be noted that in terms of s 27(4)(c) of the Higher Education Act of 1997 the Minister can appoint (not nominate) five members. However, in terms of s 5A these members must comply with the eligibility criteria as determined by the institutional statute.

[314] *King IV 57*, recommended practices 63 – 64.

[315] *King IV* 57, recommended practices 62 – 64. For this committee's role in general, see Deloitte "King IV on Corporate Governance: What is new and what has changed?" http://www2.deloitte.com/na/en/pages/risk/articles/king-iv-report-on-corporate-governance-bolder-than-ever.html (Date of use: 4 September 2016)

and report to Council on these risks. This committee must also establish risk mitigation processes and have a risk management system in place.[316]

The establishment of a committee responsible for remuneration is also recommended by *King IV*.[317] This committee must recommend a policy that will result in fair, responsible and transparent remuneration.[318] *King IV* aims to foster enhanced transparency with regards to reporting on remuneration. An important introduction into *King IV* is that the remuneration committee should consider and disclose the measures put in place to attain fair and responsible executive remuneration in the context of overall employee remuneration.[319] A remuneration committee is also required by the *2014 Reporting Regulations.*[320] In terms of these regulations, the remuneration committee must disclose its remuneration policy. Executive remuneration and bonuses, as well as any fees paid to the Council members, must be disclosed amongst others. The Companies Amendment Bill of 2018 suggests an amendment to section 30 of the Companies Act of 2008. It also requires an implementation report containing each individual director's remuneration and benefits.[321] It is recommended that the *2014 Reporting*

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[316] *2014 Reporting Regulations* 26 – 28.

[317] *King IV* 57; recommended practice 65. For more about remuneration committees in general, see Bussin M "Factors Driving Changes to Remuneration Policies in South Africa" 2015 (2) *SAJLR* 43 – 63. Disclosure on remuneration should be as follows: a statement that provides the context for remuneration policy and decisions; (ii) an overview of the main provisions of the remuneration policy and (iii) the actual remuneration awarded to each executive and prescribed officer. The level of disclosure is strengthened by recommending that shareholders be given the opportunity to pass separate, non-binding advisory votes on the policy and its implementation, but with the consequence that compulsory shareholder engagement is triggered in the event that either the policy or its implementation is not supported by a vote of at least 75% of the voting shares.

[318] *King IV* 31; 64 recommended practice 27.

[319] *King IV* 31. The *2014 Reporting Regulations* 23 are also discussed in para 4.4.4 below. See s 30(6) of the Companies Act of 2008, which defines remuneration for the purposes of annual financial statements. Also, see regulation 43 of the Companies Act of 2008. See in general, Madlela V and Lehloenya PM "The Regulation of Executive Remuneration in South Africa" 2016 (37) *Obiter* 1 – 19.

[320] *2014 Reporting Regulations* 23 – 24.

[321] B-2018 *Government Gazette* Nr. 41913 (GN. 969) 21 September 2018 clause 5.

Regulations be amended so that the remuneration and all benefits (not only bonuses) of all executives above a certain peromnes level[322] be reported on an annual basis.[323] The reason for this recommendation is that enhanced reporting relating to remuneration practices of higher education institutions will ensure public accountability.

Social and Ethics Committees was introduced as a requirement for some companies in the Companies Act of 2008, and these committees are unique to South Africa.[324] *King IV* urges all organisations to establish such a committee and recommends a higher standard for the composition of this committee than the one provided for in the Companies Act of 2008. Regulation 43 of the Companies Act of 2008 confirms that a board must give attention to the matters handled by the Social and Ethics Committee. These duties include social and economic development; good corporate citizenship; the environment, health and safety; consumer relationships; as well as labour and employment. According to Wixley, by creating a specific duty for this committee to monitor and report on each of these duties, the Companies Act of 2008 imposes a higher duty on the board to consider them. It is curious that despite the name of this committee, there is no mention of codes of conduct or ethics.[325] *King IV* recommends that the role of the social and ethics committee should go further than prescribed in the

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[322] Peromnes level is the grading level used for staff in public universities.

[323] See Chapter 6, para 6.4.2 below for recommendations in this regard.

[324] Section 72(4) – (10) of the Companies Act of 2008, read together with regulation 43. It is not the intention of this research to include an extensive discussion on the Social and Ethics Committee. see in general, Havenga MK "The Social and Ethics Committee in South African Company Law" 2015 (78) *THRHR* 286 – 288; Stoop HH "Towards Greener Companies - Sustainability and the Social and Ethics Committee" 2013 *Stell Law Review* 574 – 580; Kloppers HJ "Driving Corporate Social Responsibility (CSR) through the Companies Act: An Overview of the Role of the Social and Ethics Committee" 2013 (16) *PELJ* 166 - 188. The Companies Bill of 2018 now amends s 72 relating to social and ethics committees. *King IV* expands on the role of the social and ethics committee; for instance, the committee's direction and oversight of management ethics is addressed as well as the socially responsible aspects of a remuneration policy.

[325] Wixley, Everingham and Louw *Corporate Governance* 135.

Companies Act of 2008, and should include matters about ethical behaviour and risk management.[326] The social and ethics committee's mandate is to monitor and report on the company's social performance in five areas, namely, social and economic development; good corporate citizenship; the environment, health and public safety; consumer relationships; and labour and employment.[327] The committee's monitoring function should include an assessment of the company's performance in relation to applicable legislation, legal requirements and codes. It should also conduct regular reviews of the performance of the company.[328]

King IV recommends that the majority of the governing body members be non-executive, to ensure that independent judgment prevails.[329] The Companies Amendment Bill of 2018 proposes that the Minister may

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[326] Deloitte "King IV on Corporate Governance: What is new and what has changed?" http://www2.deloitte.com/na/en/pages/risk/articles/king-iv-report-on-corporate-governance-bolder-than-ever.html (Date of use: 30 August 2018).

[327] Section 72(8) of the Companies Act of 2008, read together with Regulation 43; Havenga 2015 *THRHR* 288 – 291. The mandate in terms of the Companies Act of 2008 is to monitor the company's activities, having regard for any relevant legislation, other legal requirements or prevailing codes of best practice in relation to social and economic development, good corporate citizenship, the environment, health and public safety; consumer relationships; and labor and employment; to draw matters within its mandate to the attention of the Board as occasion requires; and report, through one of its members to the shareholders at the company's annual general meeting on the matters within its mandate. See in general, Rossouw *The Social & Ethics Committee Handbook* 23 - 25; Esser IM and Delport P "The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom's Enlightened Shareholder Value Approach: Part 2" 2017 (50) *De Jure* 221 – 232. The Companies Bill of 2018, if promulgated, will amend s 72 relating to social and ethics committees. The amended section still only requires Social and Ethics Committees for a public or state-owned company. It does, however, stipulate the composition of the committee, of which at least one director must be independent. Furthermore, the amendment will also provide for exemption provisions.

[328] Wixley, Everingham and Louw *Corporate Governance* 139.

[329] *King IV* 29 – 30; 57, recommended practice 68 – 70. See in general, Kloppers 2013(16) *PELJ* 165 – 199. South Africa is the first country to have a social and ethics committee as a statutory committee. Deloitte "The Companies Act, the Social & Ethics Committee and the management of the ethics performance of the company" 2014 http://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA_SocialAndEthicsCommitteeAndTheManagementOfTheEthicsPerformance_24032014.pdf (Date of use: 30 August 2018). See also Rossouw D *The Social and Ethics Committee Handbook* 2nd ed (The Ethics Committee 2018) 21 -22; Schoeman C "Guidance for Social and Ethics Committees" 2015 *HR Future* 42 – 43

prescribe minimum qualification requirements for members of this committee to ensure that members have adequate, relevant knowledge and experience to ensure that the members can perform their functions.[330] The Companies Amendment Bill, if promulgated in its current form, also provides that the Minister may prescribe the functions of this committee.[331] The committee should report any risks associated with the social and ethics committee's mandate to the board.[332] The broad mandate of this committee may create an administrative burden for companies. However, these matters affect all companies and must be attended to. It must be noted that failure to comply with these duties might expose the committee members as well as the board to potential action in terms of section 218 of the Companies Act of 2008.[333] It is suggested that in the higher education sector there should be such a committee with representatives from related committees such as the risk management committee.

Section 29 of the Higher Education Act of 1997 prescribes committees of Council and Senate and states that the Council and Senate of a public higher education institution may each establish committees to perform any of their functions and may appoint persons, who are not members of the Council or the Senate, as the case may be, as member of such committees. Neither the Council nor the Senate will be divested of responsibility for the performance of any of their functions delegated to any of these committees.[334] There are no specific committees mentioned in the

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[330] Section 5A(b) of the Companies Amendment Bill of 2018.

[331] Section 5A(e) of the Companies Amendment Bill of 2018.

[332] Section 5A(f) and (g) of the Companies Bill of 2018 proposes that the social and ethics committee prepare a report in the prescribed manner and form, which must be externally assured. The report must then be presented to the shareholders.

[333] Wixley, Everinham and Louw *Corporate Governance* 141 – 142.

[334] Section 29(1) and (2) of the Higher Education Act of 1997. Section 29(4) states that "the composition, manner of election, functions, procedure at meetings and dissolution of a committee and a joint committee are determined by the institutional statutes and institutional rules or an Act of Parliament." However, the *Regulations for Reporting by Public Higher Education Institutions* that became effective on 1 January 2015, prescribe certain committees i.e. a remuneration committee, finance committee,

section, and it is left to universities to provide for the particular committees in their institutional statutes in accordance with the *2014 Reporting Regulations*. In accordance with these regulations, universities should constitute at least a remuneration committee, finance committee, planning and resources committee, Council membership committee, audit committee, risk committee and IT governance committee.[335]

Principle 9 of *King IV* recommends that the governing body should ensure that the evaluation of its own performance and that of its committees, their chairs and individual members support continued improvement in the performance and effectiveness of the university.[336] This principle also recommends that a governing body should have a formal process in place to evaluate the performance of the governing body, its committees, the chairpersons and members.[337] However, in the author's view, in the context of a higher education institution, it would be more effective if an external body like the CHE were responsible for the assessment of Council members at least every two years. It is suggested that, in alignment with *King IV*, the following be disclosed in relation to the evaluation of the performance of the governing body: a description of all other performance evaluations undertaken during the reporting period, including their scope, whether they were formal or informal, and whether or not they were eternally facilitated; an overview of the evaluation results and remedial actions taken; and whether the governing body is satisfied that the evaluation process is improving its performance and effectiveness.[338] In the author's view, each public university should have a formal process to

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planning and resource committee, audit committee, risk committee and IT governance committee.

[335] *2014 Reporting Regulations* 23 – 27. See para 4.4.4 below for a more detailed discussion of the committees of higher education institutions and the compliance to the *2014 Reporting Regulations*.

[336] *King IV* 58; recommended practices 71 – 75.

[337] *King IV* 58; recommended practice 73.

[338] *King IV* 58; recommended practice 75.

evaluate committees, their chairpersons and their members. This should preferably be an independent evaluation carried out by CHE or USAf, and a report with recommendations should be submitted to the Council every two years. This report should contain information regarding the effectiveness of the Council after concluding questionnaires and conducting interviews with Council members; comments on how the Council complied with its code of conduct; statements on any reported conflict of interest; what value was contributed by the Council during the reporting period; whether the Council was adhering to the values and strategic objectives of the institution; statements on the effectiveness of the Council and Senate committees, whether they add value and the members have the proper knowledge and skills for a specific committee; and statements on how effectively the Council is handling the financial decisions of the institution. The report should also contain any remedial action that needs to be undertaken by the Council.

According to principle 10, the governing body should ensure that the appointment of, and delegation to management contribute to role clarity and the effective exercise of authority and responsibility.[339] Section 26 of the Higher Education Act of 1997 provides for the governing structures and offices of higher education institutions. Some of these offices include the office of the Principal, Vice-principals and the SRC. The institutional statute of an institution plays an important role in clarifying the responsibilities of these offices. Although each university's institutional statutes differ, they usually all provide for at least the following: the constitution of the Council and Senate and the term of office of members; the conduct of the Council and Senate meetings; and the role and responsibilities of the office of the Chancellor, Vice-Chancellor, Deputy-Vice Chancellors, Registrar, Executive Deans and Executive Directors. It is of utmost importance that each public institution ensures that it has a proper delegation of authority in place for management to make financial decisions and the signature of

[339]*King IV* 58 – 59; recommended practices 76 – 99.

contracts. The same recommendation is also made with regards to Council and Senate committees to ensure that their roles, mandates and decision-making powers are clear.[340]

An essential addition to *King IV* was the recommendation of the appointment of professional corporate governance services to assist the governing body.[341] It is advised that the governing body ensure it has access to professional and independent guidance on corporate governance and its legal duties and that it has support to coordinate its functioning as well as that of its committees. *King IV* further recommends that all organisations should, as a matter of good practice, consider appointing a corporate governance professional to fulfil the role that is ascribed to a company secretary in terms of the Companies Act of 2008.[342] It is, therefore, a recommendation that higher education institutions obtain the services of a corporate governance specialist as required by *King IV* to ensure enhanced compliance with applicable corporate governance principles.

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[340] *King IV* 59; recommended practice 85.

[341] See Chapter 6, para 6.4.2 below for recommendations in this regard.

[342] *King IV* 59 – 60; recommended practice 90 – 99. Swart M "The Company Secretary defined: business insight" 2007 (1) *Enterprise Risk* 12 – 15; Wolpert J "RM Responsibilities: The Role of the Company Secretary: Corporate Governance" 2010 (4) *Enterprise Risk* 36 – 37. The duties of a company secretary are set out in s 88 of the Companies Act of 2008 and include the following: providing the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers; making the directors aware of any law relevant to or affecting the company; reporting to the company's board any failure on the part of the company or a director to comply with the Memorandum of Incorporation (MoI) or rules of the company or this Act; ensuring that minutes of all shareholders meetings, board meetings and the meetings of any committees of the directors, or of the company's audit committee, are properly recorded in accordance with the Companies Act of 2008; certifying in the company's annual financial statements whether the company has filed the required returns and notices in terms of the Companies Act of 2008, and whether all such returns and notices appear to be true, correct and up to date; ensuring that a copy of the company's annual financial statements is sent, in accordance with this Act, to every person who is entitled to it; and carrying out the functions of a person designated in terms of s 33(3) of the Companies Act of 2008.

(c) Governance functional areas

This chapter in *King IV* consists of five principles relating to the functional areas of governance, namely the governance of risk, technology and information, compliance governance, remuneration governance and assurance.[343] These functional areas are all critical to good governance in public higher education institutions and are discussed separately below.

Risk governance is addressed in principle 11 of *King IV*.[344] It relates to the management of risk by the governing body in such a way that it achieves its objects.[345] The governing body should evaluate and agree on the nature and extent of the risks that the organisation should be willing to take in pursuit of its strategic objectives. In particular, it should approve the organisation's risk appetite[346] and limit the potential loss that the organisation could feasibly tolerate.[347] The *2014 Reporting Regulations* require that each public higher education institution have a risk committee, be it a standalone committee or a combined audit and risk committee. The responsibility of this committee is to consider all issues of risk, which may result in some form of exposure for the institution.[348] *King IV* suggests that the following aspects should be disclosed in relation to the governance of risk: key areas of focus during the reporting period, the key risks that the organisation faces as well as undue, unexpected or unusual risks or risks taken outside of risk tolerance levels; actions taken to monitor the

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[343] Part 5.4 of *King IV* 61 – 70.

[344] *King IV* 61 – 62; recommended practices 1 – 9.

[345] *King IV* 61; recommended practice 1.

[346] This is the propensity to take appropriate levels of risk. See in general, Wiese *Corporate Governance in South Africa with International Comparisons* 110 – 117; Naidoo *Corporate Governance: An Essential Guide for South African Companies* 287 – 302; Esser and Havenga (eds) *Corporate Governance Annual Review* 2012 50 – 52.

[347] *King IV* recommended practice 4.

[348] *2014 Reporting Regulations* 26. See para 4.4.4 below for a discussion of the *2014 Reporting Regulations*.

effectiveness of risk management and how the outcomes were addressed; and planned areas of future focus.[349] Risk evaluation should ultimately be the responsibility of the risk committee of each public higher education institution.

Principle 12 states that the governing body should govern technology and information in a way that supports the organisation setting and achieving its strategic objectives.[350] Over the last decades, technology has improved tremendously, and it has become critical for institutions to use technology to improve governance at institutions.[351] Information and technology overlap, but each can function on its own.[352] *King IV* recognises information as a corporate asset separate from technology.[353] Each governing body should provide strategic direction for the management of technology and information, and this should ultimately be done through an Information Technology governance committee.[354] In respect of higher education

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[349] *King IV* 61; recommended practice 9.

[350] *King IV* 62 – 63; recommended practices 10 – 17. According to the recommended practices under this principle, the governing body should oversee the adequacy and effectiveness of technology and information management, including: exploitation of opportunities offered by technology and digital developments; ethical and responsible use of technology and information; information management that creates and enhances intellectual capital in the organisation; integration of people, technologies, information and processes in the digital business value chain; assessing return on investment; risk oversight of outsourced services and the supply chain for the acquisition of goods and services; and compliance with relevant laws. See in general on the topic of technology and Information Wiese *Corporate Governance in South Africa with International Comparisons* 117 and for more on cyber security see p 118; Naidoo *Corporate Governance: An Essential Guide for South African Companies* 306 – 309. Johl C, Van Solms R and Flowerday S "Information Technology Governance in the Context of Higher Education Governance in South Africa" 2014 (28) *SAJHE* 128 – 148 with regards to IT governance in higher education.

[351] Johl, Van Solms and Flowerday 2014 (28) *SAJHE* 635.

[352] Giles J "King IV Code and IT Governance" November 2016 Michalsons https://www.michalsons.com/blog/king-iv-code-and-it-governance/18691 (Date of use: 30 August 2018).

[353] See Deloitte "King IV on Corporate Governance: What is new and what has changed?"http://www2.deloitte.com/na/en/pages/risk/articles/king-iv-report-on-corporate-governance-bolder-than-ever.html (Date of use: 30 August 2018).

[354] *King IV* 62; recommended practice 10.

institutions, the *2014 Reporting Regulations* also require the establishment of an Information Technology governance committee.[355] Each public higher education institution should, therefore, approve a policy that pertains to the use of technology and information.[356] This policy should set out the information technology governance framework for each institution as well as how the information technology risk management will be addressed. It should also include a cybersecurity plan to safeguard the institution's information, data, programmes and devices against cyber breaches. Due to the nature of higher education institutions, such institutions will, for instance, store high volumes of personal data and will use appropriate software programmes to capture and store this information.[357]

According to *King IV*, each governing body should exercise ongoing oversight of technology and information management. The following objectives should be achieved: integration of people, technologies, information and processes across the institution; integration of technology and information risks into the institutions' risk management strategy; proactive monitoring of intelligence to identify and respond to security breaches, including cyber-attacks and harmful social use; management of the performance of, and the risks relating to any third-party and outsourced service providers of the institution; the assessment of value delivered to the institution through significant investments in technology and information; the responsible disposal of obsolete technology and information in a way that has regard for the environment and information security; ethical and responsible use of technology and information; and compliance with relevant laws.[358] Each institution should have a policy in

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[355] *2014 Reporting Regulations* 27. See para 4.4.4 below for a discussion of the *2014 Reporting Regulations*.

[356] Similar to the general recommendation for organisations contained in *King IV* 62; recommended practice 11.

[357] McFarlane D "Understanding the Relationship between Information Governance and Cyber Security" June 2017 https://www.hanzo.co/blog/understanding-the-relationship-between-information-governance-and-cyber-security (Date of use: 3 November 2018).

[358] *King IV* 62; recommended practice 13.

place to provide for these matters. It is critically important that the information technology department of each institution ensure that they educate staff on the safe use of technology and especially cybersecurity.[359] Each public higher education institution should have a technology and information governance committee that feeds into the institution's audit and risk committee to ensure that any risks identified are dealt with on a high level.

King IV also advocates compliance governance.[360] Accordingly, each institution should ensure compliance with applicable laws as well as non-binding rules, codes[361] and standards[362] in a way that will ensure that the institution is being ethical and a good corporate citizen. This also includes proper accountability for those who act in an unethical way and cause harm to the institution, especially since these are public institutions receiving and spending public funds.[363] Therefore, compliance governance must receive the necessary attention from the Council, which must lead by example. Each governing body should approve policies that articulate and give effect to its direction on compliance and identify which rules, codes and standards the organisation has adopted.[364]

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[359] See in general, Kortjan N and Van Solms R "A Conceptual Framework for Cyber Security-awareness and Education in South Africa" 2014 *South African Computer Journal* 29 – 41.

[360] *King IV*, principle 13.

[361] Like the *King IV* code.

[362] Like the standards issued by the International Organisation for Standardization (hereinafter referred to as the ISO standards).

[363] *King IV* 63; recommended practice 18.

[364] *King IV* 63; recommended practice 19. For example, each institution should commit to accept and comply with *King IV*. Further to this, where an institution has chosen to comply with standards like the ISO standards, the policies of the institution must indicate this and ensure that the principles of these standards are incorporated into the policy and followed. Another example is the *International Integrated Reporting Framework*.

The Council of each institution is the highest decision-making body of a university; the oversight of compliance will, therefore, lie with it. However, the Council of each institution should delegate the responsibility for the implementation, execution and management of effective compliance management to the executive management of the institution under the leadership of the vice-chancellor.[365] The following should be disclosed in relation to compliance: an overview of the arrangements for governing and managing compliance; key areas of focus during the reporting period; actions taken to monitor the effectiveness of compliance management and how the outcomes were addressed; and planned areas of focus. The author recommends that these aspects be reported on in the annual report of each public higher education institution.[366]

It is a recommendation of *King IV* that each organisation, including higher education institutions, should implement fair remuneration practices.[367] Executive remuneration for directors of companies are regulated by the Companies Act of 2008, the common law, the JSE listing requirements (where applicable) and other regulatory standards, which include the *King Code.*[368] Although the Higher Education Act of 1997 does not contain similar provisions to those of section 30(6) of the Companies Act of 2008,[369] the

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[365] *King IV* 64: recommended practice 20. Section 27 confirms that the Council is responsible for governing the institution, while s 30 states that the vice-chancellor is responsible for the management and administration of the university. The governing body should exercise ongoing oversight of compliance and, in particular, oversee that it results in the following: compliance being understood not only for the obligations it creates, but also for the rights and protections if affords; compliance management, taking a holistic view of how applicable laws and non-binding rules, codes and standards relate to one another; and continuous monitoring of the regulatory environment and appropriate responses to changes and developments. See PWC "Corporate Governance is a performance issue" http://www.pwc.com/la/en/risk-assurance/corporate-governance.html (Date of use: 30 August 2018). *King III* made provision for the compliance with laws, rules, codes and standards in Chapter 6.

[366] The recommendations regarding this are contained in Chapter 6, para 6.4.

[367] Principle 14; *King IV* 64 – 65.

[368] Lehloenya 2016 *Obiter* 4.

[369] Section 30(4) of the Companies Act of 2008 defines remuneration to include *inter alia*: salaries, bonuses and performance-related payments; expenses; pension fund contributions; the value of any option or right given directly or indirectly to a director;

2014 Reporting Regulations do require a remuneration committee and provide terms of reference.[370]

Following the financial crisis of 2008, executive remuneration has come under the spotlight given the growing number of excessive remuneration packages of directors. There is increasing concern over the lack of transparency and accountability in determining executive remuneration. Further problems identified in determining these remuneration packages include *among* other things conflict of interest among those determining the packages; misalignment of management and shareholder interests; inadequate protection of shareholder governance rights, excessive levels of remuneration which conflict with the corporate governance principles of fair and responsible remuneration and excessive remuneration conflicting with the fiduciary duties owed by directors to the company. Excessive remuneration can have a negative effect on the stock markets, as investors may be hesitant to invest in a company where directors are paid exorbitant packages. There is also a growing concern that the gap between the remuneration of executives and other workers is too big.[371]

The Companies Act of 2008 provides for various mechanisms in place to ensure fair and transparent remuneration. For instance, in terms of section

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any financial assistance; and any loans provided to a director. The Companies Act Amendment Bill of 2018. Requires that this is also made applicable to prescribed officers and each individual must be mentioned by name. The Companies Act Amendment Bill also now requires that a director's remuneration report be included in the annual reporting of each company (s 30A). See in general, Luiz S "Executive Remuneration and Shareholder Voting" 2013 *SA Merc LJ* 291 – 292.

[370] See *2014 Reporting Regulations* 23 – 24.

[371] Madlela and Lehloenya 2016 *Obiter* 1; Akua Asafo-Adjei M *Regulation of Executive Directors Remuneration in South Africa: The Road to Achieve Good Corporate Governance* (Published LLM thesis University of Cape Town 2015) 2, 6; Kneale C *Corporate Governance in Southern Africa* (Chartered Secretaries Southern Africa 2012) 176-195; Wiese *Corporate Governance in South Africa with International Comparisons* 56 – 63.; Naidoo *Corporate Governance: An Essential Guide for South African Companies* 247 – 265.

165,[372] shareholders, as well as other stakeholders, may challenge board decisions where excessive remuneration was approved. This statutory provision should deter directors from making decisions to overpay the directors. Further to this, the shareholders may also invoke section 163 relating to relief from oppressive or prejudicial conduct or abuse of the separate juristic personality of the company. A court has extensive powers to grant interim or final relief, which may include some of the following: restraining the company's conduct that was complained about; regulating the company's affairs; directing the company to change its Memorandum of Incorporation; directing the company to amend a unanimous shareholder agreement.[373]

King IV, in the view of the author correctly emphasises the need for disclosure of executive remuneration. Section 30(4) of the Companies Act of 2008 stipulates that the financial statements of each company that are required in terms of the Companies Act, must be audited on an annual basis and must disclose the remuneration and benefits of each director.

Fair and transparent remuneration is very important in the higher education environment as institutions have a vast number of employees, ranging from top management to entry-level staff across various sectors. In a recent media report, it became apparent that universities were paying excessive

[372] This section provides for derivative actions. In terms of s 165(2), "a person may serve a demand upon a company to commence or continue legal proceedings, or take related steps to protect the legal interests of the company if the person (a) is a shareholder or a person entitled to be registered as a shareholder of the company or of a related company; (b) is a director or prescribed officer of the company or of a related company; (c) is a registered trade union that represents employees of the company or another representative of employees of the company; or (d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person."

[373] Madlela and Lehloenya 2016 Obiter 5. On the oppression remedy in general see Cassim MF "The Appraisal Remedy and the Oppression Remedy under the Companies At of 2008, and the Overlap between them" 2017 (29) *SA Merc LJ* 305 – 324; Lehloenya M and Kgarabjang T "Defining the Limits of the 'Oppression Remedy' in the wake of section 163 of the Companies Act 71 of 2008 – *Grancy Properties Limited v Manala* (2013) 3 All SA 111 (SCA)" 2015 (36) *Obiter* 511 – 518. For more on derivative actions in terms of s 165, see in general Cassim 2017 (38) *Obiter* 673 – 688; Cassim 2013 (130) *SALJ* 496 – 526.

packages to vice-chancellors and other executives.[374] Considering that universities receive public money and this money should be spent for the public good, it is concerning that such exorbitant salaries are paid to these executives. It seems that public higher education institutions are competing with large corporations. The Department of Higher Education and Training should investigate this matter to ensure that the remuneration practices at public universities are fair and transparent.

In accordance with the principles of fair remuneration practices, each institution should ensure that it remunerates fairly, responsibly and transparently so as to promote strategic objectives and positive outcomes in the short, medium and long term.[375] *King IV* recommends practices with regards to remuneration policy and reporting, as the governing body should provide strategic direction for fair, responsible and transparent remuneration on an enterprise-wide basis.[376] The Companies Amendment Bill of 2018 proposes that each company should ensure that remuneration is reported on in three parts, namely, a background statement, an overview of the main provisions of the organisation-wide policy on remuneration and an implementation report which contains details of all remuneration and

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[374] Govender P "SA's Cash-strapped Universities pay Bosses Multimillion-Rand Salaries" 2018-11-11 *Sunday Times*. The packages received by some of the Vice-Chancellors range from R2.5 million to R4.5 million rand. The former Vice-Chancellor of the University of Johannesburg received a shocking R17.6 million for 2017 that included bonuses and incentives.

[375] *King IV* 64 – 65; recommended practices 26 – 30. The remuneration policy should be designed to achieve the following objectives: to attract, motivate, reward and retain human capital; to promote the achievement of strategic objectives within the organisation's risk appetite; to promote positive outcomes; and to promote an ethical culture and responsible corporate citizenship.

[376] See the new proposed s 30A(2) and *King IV* 54 – 65; recommended practices 26 – 31.
See Deloitte "Remuneration Governance" https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/za_Deloitte_KingIV_Remuneration_Governance_01032017.pdf (Date of use: 30 August 2018).

benefits awarded to individual members of the institution during the reporting period. This is also in line with *King IV*.[377]

The *2014 Reporting Regulations* provide for a remuneration committee, which needs to report to the Council on remuneration matters. Since the *2014 Reporting Regulations* are not yet aligned with *King IV*, it is recommended that they should be revised and updated accordingly.[378] It is further suggested that reporting on remuneration should include transparency about all benefits of Council members and members of the executive management. This must include any fees paid to a Council member for services rendered; salaries, bonuses and performance-related payments; expense allowances; contributions to any pension fund; any financial assistance that has been provided to a Council member or a member of the executive management; any loan that was provided to a Council member or member of the executive management; and housing and travel benefits. These disclosures should be made in respect of each individual, who should be named in the annual report. Section 30 of the Companies Act of 2008 and its proposed amendment under clause 6 of Companies Amendment Bill of 2018 provide guidance in this regard.

Principle 15 states that the governing body should ensure that assurance services and functions enable an effective control environment and support the integrity of information for internal decision-making and the organisation's external reports.[379] The *King IV* principle contains recommended practices for a combined assurance model[380] and states that

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[377] *King IV* 65; recommended practice 32 – 35. For a full discussion of the background statement, overview of remuneration policy and implementation report, see *King IV* 66 – 67; recommended practices 33 – 35.

[378] *2014 Reporting Regulations* 23 – 24. See section 4.4.4 below for a discussion of the *2014 Reporting Regulations*.

[379] *King IV* 68 – 70 recommended practices 40 – 61.

[380] In terms of *King IV*, a combined assurance model is defined as follows: "It incorporates and optimises all assurance services and functions so that taken as a whole, these enable an effective control environment; support the integrity of information used for internal decision-making by management, the governing body and

the governing body should delegate to the audit committee the mandate to provide direction for the use of a combined assurance model to achieve certain objectives.[381] This principle also contains recommended practices for internal auditing functions.[382] The International Standards for the Professional Practice of Internal Audit recommends that the internal audit function must report directly to senior management and the board.[383] In the context of higher education institutions, the internal audit should report directly to the Vice-Chancellor and Council. The internal audit office must have unfettered access to the chair of the audit committee as well as the chair of Council. The Council should assume responsibility for internal auditing by determining the direction for the internal audit arrangements to provide objective and relevant assurance that contributes to effective governance, risk management and control processes. The governing body should delegate this function to the audit committee.[384]

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its committees; and support the integrity of the organisation's external report." *King IV* 10. See in general *King IV* 68, recommended practices 40 - 43; Barac K and Forte J "Combined Assurance: A Systematic Process 2015 (17) *SAJAAR* 71 – 83; Masite SJ "Combined Assurance as an Element of Effective Corporate Governance" 2017 (18) *Chartered Institute of Government Finance Audit and Risk Officers Journal* 16 – 18; Masegare P "Implementing Value-Added Combined Assurance Interventions for South African Organisations" 2018 (1) *Journal of Management and Administration* 129 – 149.

[381] *King IV* 68; recommended practice 40. These objectives include adequacy and effectiveness of the internal control environment and the integrity of information used for reporting and decision-making. For more on the assurance of external reports, see *King IV* 69.

[382] *King IV* 69 – 70; recommended practices 48 – 61. Barac K and Viljoen PC "Managing risk: What Should Internal Audit do?" 2015(17) *SAJAAR* 5 – 17; Coetzee P and Lubbe D "The use of Risk Management Principles in Planning an Internal Audit Engagement" 2013 (17) *South Africa Business Review* 113 – 139; De Jager H "Practices of Internal Auditing in South Africa" 2015 (17) *SAJAAR* 1 – 4.

[383] *International Standards for the Professional Practice of Internal Audit* 11.

[384] It is important that the governing body approve an internal audit charter that defines the role and associated responsibilities and authority of internal audit, including addressing its role within combined assurance and the internal audit standards to be adopted. Furthermore, the governing body should monitor on an ongoing basis that an internal audit follows an approved, risk-based, internal audit plans reviews the organisational risk profile regularly, and proposes adaptations to the internal audit plan accordingly. See *King IV* 69 – 70.

4.4.4 The *regulations for reporting by public higher education institutions*

In 2014, the *Regulations for reporting by public higher education institutions* were published.[385] These regulations repealed the *Regulations for annual reporting by public higher education institutions* of 2007.[386] They provide guidance on the annual report which must be submitted by a public higher education institution and confirm the need to comply with King III.[387] The *Regulations* were issued in two parts, namely, regulations and an implementation manual. The *2014 Reporting Regulations* confirm that the regulations apply to all public higher education institutions and that each institution *must* produce and submit an annual report to the Department of Higher Education and Training.[388] The annual reporting requirements pertaining to the specific reports that must be included in the annual report are contained in clause 7 of the regulations.[389] These regulations contain some contradictory statements as it seems that the regulations contained in part 1 and 2 must be complied with, while the implementation manual appears to act as a guideline only.[390] The *2014 Reporting Regulations* were based on *King III,* and there is a need for these regulations to be updated in line with *King IV*.[391] The *Regulations* "encourage" compliance with *King*

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[385] *Government Gazette* Nr. 37726 (GN. 464) 9 June 2014. They became effective on 1 January 2015.

[386] *Government Gazette* Nr. 30132 (GN. 691) 1 August 2007.

[387] See *2014 Reporting Regulations* 15 – 17 regarding compliance with *King III.*

[388] *2014 Reporting Regulations* 6.

[389] *2014 Reporting Regulations* 9 – 10.

[390] Part 1 and 2 is contained on pages 4 – 10 while the implementation manual is contained on pages 11 – 35 of the *2014 Reporting Regulations.*

[391] The DHET has indicated that the update of the *2014 Reporting Regulations,* in line with *King IV* was planned for the future but there was no timeline for the publication of the revised regulations.

III.[392] The author recommends that when the *2014 Reporting Regulations* are amended by the DHET to comply with *King IV*, it should be stated clearly that public higher educations *must* comply with the *King IV* provisions. They must also outline the consequences of non-compliance.

The implementation manual contained in the *2014 Reporting Regulations* provides a guideline to higher education institutions rather than imposing a statutory framework. However, the *2014 Reporting Regulations* do not always make it clear what are actual requirements and what are merely guidelines. This could result in confusion and non-compliance. Scrutiny of the annual reports of six public higher education institutions for 2015, 2016 and 2017 indicate that institutions do not consistently report on the same matters. The reports were selected from the publicly available annual reports and provide a sample of reports from traditional (academic) and comprehensive university as well as one from the newly established universities. It is not the intention of this thesis to deal with these annual reports in detail, but rather to make certain observations as to the different ways in which universities report and on their compliance with the *2014 Reporting Regulations.* One of the six annual reports considered was more than double the volume of the other institution's reports. The Council report of one of them was only two pages long and provided an overview; while the other institution's Council report, amongst other things, highlighted matters that were discussed and approved, the attendance of meetings and performance reviews. The report of the chairperson of Council should be an integrated report that provides adequate and relevant information relating to the operations of the institution.[393] Generally, the Council reports of all the institutions reviewed did not, in the author's view, provide adequate information. Amongst other things, this report should include information about the Council's sub-committees, and confirmation that

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[392] See *2014 Reporting Regulations* 17. Unfortunately, they incorrectly refer to the *King III* principles as only being applicable to listed companies whereas *King III* clearly states that they apply to all entities. *King III* 17.

[393] *2014 Reporting Regulations* 19.

these committees are chaired by external individuals with appropriate skills and experience. In addition, reference should be made to significant matters on the agendas of these committees that remain unresolved as well as include a summary of the attendance of the members of these meetings. All the reports showed only partial compliance. Although they mentioned their committees, only two included their members so that independence could be established. There was no mention of agenda items that remained unresolved. It is highly unlikely that there would be no such matters in all of the institutions given the nature of a higher education institution.[394] Moreover, the Council must give due consideration to and report on several other important matters.[395] Where the audit report has been qualified, a statement to this effect, the reason for the qualification and the steps being taken to remedy the situation should be disclosed. Three of the universities provided statements, but they did not provide any reasons, nor the steps taken by the Council to remedy the situation. In addition, any large tenders that were awarded during the reporting year must be reported on, including the process followed and the composition of the tender committee. Only one university had a statement on the tenders awarded for two of its reporting years. However, it did not include the composition of the tender committee nor the process that was followed. Furthermore, a statement is required regarding how contracts are managed, the process of managing service level agreements and the monitoring of suppliers' performance and workplace ethics.[396] Three universities included one brief paragraph to confirm that they have a contract management process in place, but none of the universities reported on the process of managing service level agreements or the monitoring of suppliers' performance and workplace ethics. Council should also indicate in its report the reasons for refusals of relevant requests for information that were lodged with an institution in terms of the Promotion of

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[394] As required in *2014 Reporting Regulations* 21.

[395] As required in *2014 Reporting Regulations* 19 – 21.

[396] As required in *2014 Reporting Regulations* 21.

Access to Information Act 2002.[397] Only one university made a statement relating to requests for access to information, but it did not include any information on the refusal of requests. Lastly, the Council should disclose any material or immaterial but often repeated regulatory penalties, sanctions, fines for contraventions or non-compliance with statutory obligations.[398] Only one of the institutions referred to this information for all three years.[399] Furthermore, only two of the six institutions contained a statement by the audit committee on how it had fulfilled its duties, while another institution did not include a report by the independent auditor in the annual report for one of the reporting years.[400]

It was found that the Vice-Chancellor of one of these institutions was also a member of its audit committee in 2015, which contravenes the 2014 *Reporting Regulations*. In 2016 and 2017, the same institution did not provide the names of the members of the audit committee, and thus its independence could not be verified. This may be due to the somewhat confusing way that the *2014 Reporting Regulations* were drafted insofar as it is not clear what information is mandatory to include in the reports and what serves merely as a guideline. Some of the information contained in the annual reports complied with the *2014 Reporting Regulations*, while other information was irrelevant or inadequate in many respects. One of the institutions, for instance, included a report on its human resource division and went into excessive detail about its operating context, its sub-committees, mentorship programme and induction. Not all of this information could be considered necessary for annual reporting purposes nor could some of these annual reports be construed as integrated reporting in line with the International Integrated Reporting Framework

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[397] As required in *2014 Reporting Regulations* 21.

[398] As required in *2014 Reporting Regulations* 21.

[399] As required in *2014 Reporting Regulations* 21.

[400] As required by the *2014 Reporting Regulations* 7; 32.

(IIRF), which advocates a concise report as well as transparency.[401] Compliance with some aspects could not be verified in the reports reviewed due to insufficient information provided in the annual reports.

None of the institutions was particularly transparent with regards to their involvement in commercial entities in which they hold shares. Although the *2014 Reporting Regulations* currently place no duty on higher education institutions to declare loans to commercial entities, it is recommended that they are changed to include reporting on any loans provided by institutions to commercial entities. Section 40(2) of the Higher Education Act of 1997 allows a public higher education institution to enter into a loan or an overdraft agreement only with Council approval. It is not clear whether this section was aimed only at instances where a higher education institution intends to obtain a loan or whether it also applies when the institution intends to provide a loan. In the author's view, the wording of the section allows for a broader interpretation, namely, that it will apply to all instances where a public higher education institution enters into a loan agreement. Since public higher education institutions receive public funding, they are subject to public accountability. Therefore, all institutions should declare any loans they provide to commercial entities as well as any remuneration paid to directors of these commercial entities. In the second report considered, the institution declared its interest in several commercial entities and confirmed loans it had provided to those entities.[402]

The *2014 Reporting Regulations* are silent on how compliance is checked or verified by the DHET. It is also silent on the consequences of non-compliance by institutions. The DHET's approach regarding compliance is

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[401] See the IIRF http://integratedreporting.org/wp-content/uploads/2015/03/13-12-08-THE-INTERNATIONAL-IR-FRAMEWORK-2-1.pdf (Date of use: 30 August 2018).

[402] See Chapter 6, para 6.4.2 below with regards to recommendations pertaining to the *2014 Reporting Regulations.* Some of the recommendations include clarification of confusing language; making it clear that there must be compliance to the *2014 Reporting Regulations*; updating it to comply with *King IV;* as well as the inclusion of principles of good governance and compliance for public higher education institutions.

to have its University Branch analyse the annual reports received from public higher institutions to check for compliance. In the event of non-compliance, they write to the institution concerned and request them to address the areas of non-compliance. However, no information could be obtained regarding the mechanisms used to check and/or verify compliance. Furthermore, the DHET confirmed by way of an email that universities must comply with all of the provisions as contained in the *2014 Reporting Regulations*, despite this not being clearly stated in the *2014 Reporting Regulations*.[403] Regulatory checks by the DHET to ensure compliance with legislation would, in the author's, promote good governance in higher education institutions.

The *2014 Reporting Regulations* confirm that the Council of a public university is responsible for its governance while the executive management is responsible for effective management and administration of the institution.[404] The integrated annual report should reflect how these duties are discharged and should be perceived as confirmation of sound governance. This makes accurate reporting and monitoring of the annual report so important.[405]

The *2014 Reporting Regulations* require public higher education institutions to establish certain committees.[406] Some of these committees are in line with the recommendations of *King IV* discussed above.[407] *King IV* also recommends that committees be established to suit the specific needs of the particular organisation.[408]

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[403] By way of email from Ms Rekha Bennideen dated 20 October 2016.

[404] Section 27 and 30 of the Higher Education Act of 1997.

[405] *2014 Reporting Regulations* 17.

[406] *2014 Reporting Regulations* 23 -27.

[407] See para 4.4.3 above for a discussion of *King IV*.

[408] *King IV* 54; recommended practice 39.

The *2014 Reporting Regulations* also provide for a remuneration committee that must issue a remuneration report to explain the institution's remuneration philosophy and how it has been implemented.[409] Higher education institutions should, in view of *King IV,* review not only their remuneration policies but also the way in which their remuneration committee functions.[410] Each university is responsible for developing and implementing the specific terms of reference of the remuneration committee. Amongst other things, the institution will be responsible for considering and reporting to Council on matters relating to staff policies, remuneration and prerequisites, bonuses, executive remuneration, remuneration of Council members, retirement funds and medical aid. Moreover, any *ex gratia* payments must be fully explained and justified.[411] It was also apparent from the executive remuneration reports of these institutions that there were substantive differences between the remuneration of executives, which could, in my view, be interpreted as unfair remuneration practices. It was apparent that some public universities allow their executives to travel first or business class, yet this is not fully disclosed in their annual reports. This may have reflected in the financial statements, but it will only be apparent to someone with the relevant knowledge and experience relating to financial statements. There is a need for more transparency concerning remuneration practices. According to the *2014 Reporting Regulations*, the remuneration committee should issue a remuneration report to explain the institutions' remuneration philosophy and how it has been implemented. Furthermore, the remuneration committee should explain its remuneration policy on base pay, including the use of appropriate benchmarks. In addition, policies regarding executive service contracts should be disclosed in the annual remuneration report, including the period of the contract and notice conditions.[412] One of

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[409] *2014 Reporting Regulations* 23 – 24.

[410] See para 4.4.3 above for a discussion of *King IV* and the remuneration committee.

[411] *2014 Reporting Regulations* 23 – 24.

[412] *2014 Reporting Regulating* 21 – 22.

the institutions reported in two consecutive reporting years that it is not yet complying with the provisions of *King III* relating to remuneration. Only two of the institutions adequately reported on their remuneration practices and provided an explanation of their remuneration policies. *King IV* sets a higher standard with regards to fair and transparent remuneration practices, and it is a recommendation that the *2014 Reporting Regulations* are brought in line with this code. Although it is not a requirement, it is a recommendation that for the sake of transparency, each institution should put a policy in place to confirm its commitment to follow fair and transparent remuneration practices as advocated in *King IV*.[413]

The second committee that is prescribed by the *2014 Reporting Regulations* is a finance committee, whose duty, amongst others, is to oversee the financial health of the higher education institution as a going concern as well as the operating and running costs and capital budgets.[414] It is also this committee's responsibility to ensure that there are adequate accounting systems in place as well as adequate and suitably qualified staff to assist the committee in executing its mandate.[415] It would appear from the annual reports of the two institutions that were considered for this research that only one had a finance committee.

The third prescribed committee is a planning and resources committee,[416] which is specific to higher education institutions. This committee works

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[413] See discussion of remuneration above in para 4.4.3 above. Chapter 6 below makes recommendations concerning remuneration committees of public higher education institution. Amongst others, it will be a recommendation that all benefits of executive management and Council members should be included in the annual reports of institutions, which include international travel benefits. See Chapter 6, para 6.4.2 below for recommendations in this regard.

[414] *2014 Reporting Regulations* 24.

[415] *2014 Reporting Regulations* 24. Recommendations in this regard are made in Chapter 6, para 6.4.2 below; also see discussion above in para 4.4.3 on *King IV* and recommended committees.

[416] *2014 Reporting Regulations* 24.

closely with the finance committee and is responsible for ensuring that the institution's medium- and long-term strategic plans are in place. Furthermore, it assists the finance committee with the preparation of the annual budget.[417]

The *2014 Reporting Regulations* also prescribe the Council membership committee, which is specific to higher education institutions and which considers nominations for vacancies on Council in terms of the relevant institutional statute.[418] This important committee is responsible for checking and verifying nominations of candidates and ensuring that Council members are elected from the correct constituencies. Both of the institutions reviewed had a similar committee according to their annual reports.

The *2014 Reporting Regulations* also require that each higher education institution have an audit committee that provides oversight of the reporting process of the institution and is customised to that specific institution.[419] In terms of the *Regulations,* this committee must report on compliance with Chapter 3 of *King III*. This will have to be updated in line with *King IV*.[420] The annual report of the institution must indicate when the audit committee was established and how many members it has. All members of the audit committee must be independent of the public higher education institution and must not be employed by this institution. Furthermore, they must be specialists in their field. The audit committee operates in accordance with written terms of reference, confirmed by the Council. In accordance with

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[417] *2014 Reporting Regulations* 24.

[418] *2014 Reporting Regulations* 24.

[419] *2014 Reporting Regulations* 24 – 26. See also Van der Nest DP, Thornhill C and de Jager J "Audit Committees and Accountability in the South African Public Sector" 2008 (43) *JPA* 545 – 558; Marx B and Els G "The Role of the Audit Committee in Strengthening Business Ethics and Protecting Stakeholders' Interests" 2009 (4) *African Journals of Business Ethics* 5 – 15.

[420] See para 4.4.3 above for the discussion of the audit committee as recommended by *King IV*.

the *2014 Reporting Regulations,* the internal auditors monitor the operation of internal control systems and report findings and recommendations to management, the audit committee and the Council.[421] The Council, operating through its audit committee, provides oversight of the financial reporting process. All higher education institutions must therefore ensure that their audit committees and their policies and practices are reviewed to ensure compliance with *King IV*. All six institutions that were scrutinised for this research had a combined audit and risk committee.[422]

The *Regulations* also prescribe a risk committee.[423] Many universities have a combined audit and risk committee. This is accepted practice if, as suggested by *King IV*, the committee ensures that enough time is dedicated to risk management or the responsibilities associated with risk.[424] If an institution elects to have two separate audit and risk committees, at least one of the risk committee members should hold joint membership of the audit committee to ensure effective functioning.[425] It is the mandate of the risk committee to consider all issues of risk which may result in some form of exposure to the institution, like financial or legal exposure. The Council's integrated report must indicate how this committee is constituted and what the reporting line is. The risk committee must maintain a reporting system that enables it to monitor changes in a public higher education's institution's risk profile and to gain assurance that risk management is effective. Furthermore, the committee establishes risk maturity levels and determines the institution's risk appetite. It then considers all possible risks, the likelihood of their occurrence and, where applicable, establishes

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[421] *2014 Reporting Regulations* 24 – 26.

[422] See Chapter 6, para 6.4.2 below for recommendations in line with *King IV*.

[423] *2014 Reporting Regulations* 26 – 27.

[424] *King IV* 55; recommended practice 53.

[425] *King IV* 57; recommended practice 63.

risk mitigation procedures. It also ensures that there are a risk management system and a risk mitigation procedure.[426]

The *2014 Reporting Regulations* also prescribe an Information Technology governance committee.[427] Upon enquiry, it was established that not all universities have such a committee. Neither of the institutions whose annual reports were scrutinised seemed to have any form of IT committee. According to the guidelines provided in the *2014 Reporting Regulations,* this committee should report to Council on the following matters: a statement that the Council is responsible for IT governance and how the Council has fulfilled this role; a statement that management is responsible for the implementation of an IT governance framework; comments on the alignment of IT with the performance and sustainability objectives of the public higher education institution; comments that Council monitors and evaluates significant IT investment and expenditure; discusses how IT is an integral part of the public higher education institution's risk management; monitoring that IT assets are managed effectively; and commenting on how the risk and audit committees assist the Council in carrying out its IT responsibilities.[428]

4.5 CONCLUSION

This chapter reviewed South African company law and corporate governance principles and developments, which may provide guidance on the governance of higher education institutions. The overview in this chapter serves as the basis for specific recommendations on governance in higher education institutions, outlined in Chapter 6 below. Various provisions of the Companies Act of 2008 were reviewed, and it was considered whether the Higher Education Act of 1997 would benefit from

[426] See Chapter 6, para 6.4.2 below for these recommendations.

[427] *2014 Reporting Regulations* 27.

[428] See Chapter 6, para 6.3.3 (principle 9) below for this recommendation.

adding similar provisions, for example in respect of the duties and liabilities of directors; the fiduciary duties and duties of care and skill;[429] liability of directors;[430] declaring a director delinquent,[431] and the removal of directors.[432] Common law fiduciary duties apply to Council members as well as the executive management of public higher education institutions. Although there is general recognition of their fiduciary duties and duties of care and skill, this author was not able to trace any case law relating to personal liability of Council members nor members of the executive management of higher education institutions for breaches of their fiduciary duties or their duty of care and skill.[433]

In the author's view, the Higher Education Act of 1997 will benefit from including similar provisions as part of the codification in the Higher Education Act of 1997. The business judgment rule in South Africa was also considered in this chapter, and it is recommended in chapter 6 below that a similar provision be included in the Higher Education Act of 1997 to provide that Council members and members of executive management who act with the required care and skill in their decision making, will be protected against personal liability.[434]

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[429] See para 4.2.5 and 4.2.6 above for a discussion of fiduciary duties and the duty of care and skill.

[430] See para 4.2.8 above for a discussion of the liabilities in terms of s 77.

[431] See para 4.10 above for a discussion of declaring a director delinquent.

[432] See para 4.9 for a discussion of removal of a director.

[433] Recently, the University of Johannesburg sued its former chair of Council as well as a member of the executive management for defrauding the University of millions. The university stated that these two members owed fiduciary duties to the university and by defrauding the University of money, they had breached their duties. The university was successful in obtaining a summary judgment against them, but it is currently under appeal. See in general *The Citizen* "R14m stolen by Former UJ Executives to be Recovered" 2018-08-08; Nkosi B "UJ Retrieves Stolen R14m from Execs" 2018-08-08 *The Star*.

[434] See para 4.2.7 above for a discussion of the business judgment rule.

The regulation of the duties of bank directors in accordance with the Banks Act of 1990 was also considered.[435] The Banks Act of 1990 must be read in conjunction with the Companies Act of 2008. Directors of banks are held to a higher standard than directors of other types of companies. The Banks Act of 1990 also provides for some corporate governance matters in addition to its provisions on the duties and liabilities of bank directors. This shows that aspects of governance can successfully be provided for in legislation, and it is submitted that the Higher Education Act of 1997 will benefit from the inclusion of similar provisions. The common law provisions still apply to banks and companies and the common law should be applied in conjunction with the statutory provisions.[436] This will also be the case in respect of higher education legislation.

All public higher education institutions should be transparent with regards to the expenditure of public funding. However, the Higher Education Act of 1997 does not specifically focus on accountability and fiduciary duties of the Council and executive management members, and this needs to be addressed. It is suggested that the Higher Education Act of 1997 include similar provisions to those contained in section 71, 75 – 77 of the Companies Act of 2008.[437]

South African corporate governance, and specifically *King IV,* was then considered in order to examine its application to the higher education sector.[438] Corporate failures in South Africa and especially the recent Steinhoff matter indicate that ineffective corporate governance still occurs. The "soft law" approach in may not be the correct approach since there is very little or no evidence of accountability.[439] In Steinhoff specifically, it

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[435] The comparison with the Banks Act of 1990 is discussed in para 4.3 above.

[436] See para 4.3 above for a comparison with the Banks Act of 1990.

[437] See para 4.2.5 above for a discussion of these provisions.

[438] *King IV* is discussed in para 4.4.3 above.

[439] See para 3.3.2(b).

seems clear that the board and the board committees contributed to the accounting scandal and the subsequent losses suffered by many people. However, so far, there has been no indication that any of these executives will be held accountable for the role that they played in the company's collapse. Legislation providing for both civil and criminal actions against these individuals exists to ensure accountability, yet so far, no action has been instituted against any of these individuals. Although legislation will not be able to prevent criminal conduct, the author is of the opinion that it should augment the soft law approach.

The *2014 Reporting Regulations* for public higher education institutions still provides for compliance with *King III*. It is clear that the *Regulations* should be revised to align with *King IV*. It was shown that the *Regulations* demand more transparency with regards to reporting, as well as compliance with corporate governance principles.[440] However, it is, not clear from the *2014 Reporting Regulations*, which provisions are requirements, and which are merely recommendations. It is specifically suggested that there should be more transparency concerning remuneration and what benefits are received by Council members as well as members of the executive management. The inclusion of a requirement that all public institutions must declare any shareholding or other interests they have in commercial entities, including any loans that were provided to these entities, is also proposed.

The *2014 Reporting Regulations* do not address the consequences of non-compliance by higher education institutions. The DHET processes to evaluate annual reports and verify compliance with the provisions of the *2014 Reporting Regulations* may need to be strengthened. In the author's opinion, the *Regulations* should be revised to ensure clear reporting requirements as well as consequences of non-compliance by these institutions. Private universities in South Africa, which have the same focus

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[440] See para 4.4.4 above for a discussion of the *2014 Reporting Regulations*.

and objectives as public universities, are governed by the Companies Act of 2008, and their directors and management are treated like the directors and management of any other company.[441] It could be argued that they are subject to a better corporate governance regime as the Companies Act of 2008 provide provisions to which these private higher education institutions must comply with.[442] In addition, it could be argued that in light of this, that private higher education institutions are subject to the Companies Act of 2008 while public universities are not. Their standards are not measured in the same way. Private higher education institutions are measured against both common law as well as statutory provisions contained in the Companies Act of 2008 while the public higher education institutions are measured against the common law and the Higher Education Act of 1997. It is not recommended in the research that public higher education institutions be registered as companies. Instead, this research has revealed that the higher education environment may benefit from amending the Higher Education Act of 1997 to include similar provisions as those contained in the Companies Act of 2008 to ensure high levels of transparency, accountability and corporate governance practices.

[441] See Chapter 2, para 2.3.2(a) above for a discussion of private higher education.

[442] See Chapter 4, para 4.2 above for a discussion these provisions.

CHAPTER 5: GOVERNANCE IN HIGHER EDUCATION: AN INTERNATIONAL PERSPECTIVE

5.1 INTRODUCTION

The two jurisdictions chosen for the comparative analysis of corporate governance in the higher education sector are the State of Georgia in the United States of America (USA) and the province of Ontario, Canada. The regulation relating to each jurisdiction's corporate law,[1] corporate governance and higher education is compared to that of South Africa.

The USA has been selected because of its interesting dual legal system, which comprises both federal and state law.[2] Further to this, the USA also has a history of segregation in higher education, which can be compared to the pre-1994 era in South Africa. More specifically, the research focuses on the State of Georgia, which has its own state Constitution[3] and the Official Code of Georgia 2017.[4] The Georgia Code of 2017 regulates corporate law in this state, including public higher education institutions, which are either for-profit or not-for-profit corporations.[5] This comparison has been included to provide an example of a jurisdiction where public higher education institutions are successfully run as either for-profit or not-for-profit corporations. The inclusion of this comparison is not to suggest that public higher education institutions in South Africa should be corporatised, but

[1] Corporate law will be discussed in para 5.2.3 below.

[2] As of September 2014, the USA consists of 50 states (one of which is Georgia). Forty-eight of these states are situated in continental USA, with Alaska and Hawaii being the other two states. For a background on the states, see https://www.reference.com/geography/52-states-america-4f1e3bb76186b443 (Date of use: 28 August 2018).

[3] See the Georgia Constitution on http://law.justia.com/constitution/georgia (Date of use: 28 August 2018). Hereinafter referred to as the Georgia Constitution, which became effective on 1 July 1983.

[4] Hereinafter referred to as the Georgia Code of 2017 on https://law.justia.com/codes/georgia/2017/ (Date of use: 28 August 2018). This Code is updated annually and for the purposes of this research, the 2017 Code was used.

[5] See para 5.2.3(c) below for a discussion of the Georgia Code of 2017.

rather to provide an example of how effectively public higher educations can operate when legislation and processes are in place to ensure proper governance and efficient management of institutions. Furthermore, there is little government intervention in the affairs of these public institutions, and many of the governing boards, which are responsible for the governance and functioning of these institutions, have ensured that essential policies, procedures and programmes have been implemented to ensure the smooth operation of the institution.

The Model Business Corporation Act (MBCA) plays an important role in governing corporate affairs in the USA.[6] It is the leading corporate statute upon which various states rely with regards to corporate law. However, the MBCA has no legal force unless it is enacted by state legislature.[7] A mandatory regime of corporate governance is followed in the USA, whereas Canada and South Africa have a partially enabling regime.[8] Each state in the USA is responsible for its own corporate law. The place of incorporation of a company may be elected and does not have to coincide with the state where the company is situated.[9] Various statutory instruments influence corporate governance and securities laws in the USA, and they are also regulated by the Securities and Exchange Commission (SEC).[10] This chapter considers selected statutes, which introduced major changes to the regulation of financial practice and corporate governance. It should be

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[6] The MBCA is annotated from time to time. The most recent version was updated in 2016. Georgia is one of the states that modelled its business code on the MBCA. The MBCA is discussed more fully in para 5.2.3(b) below.

[7] This is discussed more fully in para 5.2.3(b) below.

[8] The corporate governance regime in Canada is discussed more fully in para 5.3.4 below. See Anand AI "An Analysis of Enabling v Mandatory Corporate Governance structures post Sarbanes-Oxley" 2006 (13) *Delaware Journal of Corporate Law* 234.

[9] Backer LC *Comparative Corporate Law: United States, European Union, China and Ja*pan (Carolina Academic Press 2002) 64.

[10] For instance, the Sarbanes-Oxley Act of 2010, discussed below in para 5.2.4 below; the corporate statues of each state; and the Securities Exchange Act of 1934.

noted that these statutes also had an impact on developments in Canada in these areas.

In the USA, higher education is regulated by both federal and state law. Public higher education institutions in the USA are autonomous, and the external governing bodies of these institutions operate at arms-length from them.[11] The institutional governance structures of higher education institutions are similar to those of South African public higher education institutions.

Canada is divided into ten provinces and three territories.[12] The Canadian Constitution is the supreme law of that country and comprises both the Constitution Act of 1867 and the Constitution Act of 1982. Canada has a democratic government consisting of three branches – the executive, the legislative and the judiciary.[13] Further to this, Canada follows a federal system of governance, which means that both the provincial and territorial legislatures have their own authority to make laws.[14] Canada was chosen for this comparison because the research undertaken for this study, including discussion with the Ontario Minister of Training and Colleges has indicated that it has the lowest level of governance interference into the affairs of its universities. The reason for the selection of Ontario is that public universities in this province are incorporated, not-for-profit corporations and must, therefore, adhere to corporate laws such as the

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[11] See para 5.5.1 below for more on the higher education in the USA.

[12] Shanahan T and Jones GA "Shifting Roles and Approaches: Government Coordinating of Post-Secondary Education in Canada, 1995 – 2006" 2007 (26) *Higher Education Research and Development* 31 – 32.

[13] Hereinafter referred to as the Canadian Constitution. See Gall GL *The Canadian Legal System* (Carswell 1995) 38; for more on the Canadian Constitution see, http://www.justice.gc.ca/eng/csj-sjc/just/05.html (Date of use: 28 August 2018).

[14] For more on the Canadian Constitution, see http://www.justice.gc.ca/eng/csj-sjc/just/05.html (Date of use: 28 August 2018); Clement WHP *The Law of the Canadian Constitution* (Carswell Company 1904) 1 – 32; Oliver P, Macklem P and Des Rosiers N *The Oxford Handbook of the Canadian Constitution* (Oxford 2017) 1 – 8; Beatty D "Canadian Constitutional Law in a Nutshell" 1998 (36) *Alberta Law Review* 605 – 629.

Ontario Corporations Act of 1990[15] as well as the Charities Accounting Act of 1990[16] in addition to their own incorporating legislation. These public universities are managed like corporations, apparently very successfully, with very little involvement of the Minister of Training, Colleges and Universities.[17] At this juncture, it should be mentioned that these corporations are not managed as commercial companies, but as well-functioning public universities funded by the state where they are incorporated. The way in which these institutions are managed provides an example of effective institutional autonomy where the public universities operate at arm's length from the government.

As in the USA, Canada also has federal and provincial legislation, and corporations can choose where to incorporate. For the purposes of this thesis, the most critical legislation considered is the Canada Business Corporation Act of 1985 (CBCA),[18] which is applicable to all federally incorporated corporations; the Ontario Business Corporation Act of 1990 (OCBA),[19] which is applicable to all corporations with share capital; and the Ontario Corporations Act,[20] for all other corporations where the OBCA is not

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[15] Ontario Corporations Act of R.S.O. c .38 1990. Hereinafter referred to as the Ontario Corporations Act. For the sake of clarification, the incorporating acts of these universities make reference to the Ontario Corporations Act R.S.O. 1970 c.89. The Corporations Act of 1990 did not repeal and replace the Corporations Act of 1970. The Corporations Act of 1990 is a continuation of the 1970 and 1980 (R.S.O. 1980 c95) versions. It has therefore been amended throughout the years. The Ontario Corporations Act is discussed in para 5.3.2 below.

[16] Charities Accounting Act of R.S.O. c.C10 1990. Hereinafter referred to as the Charities Accounting Act.

[17] See the Minister of Training, Colleges and Universities website for more information https://www.ontario.ca/page/ministry-training-colleges-universities (Date of use: 28 August 2018).

[18] Canada Business Corporation Act of R.S.C 1985, c C-44. Hereinafter referred to as the CBCA.

[19] Ontario Business Corporation Act of R.S.O. c. B.16 1990. Hereinafter referred to as the OBCA.

[20] Section 2 of the Ontario Corporations Act.

applicable.[21] The Ontario Not-For-Profit-Corporations Act of 2010 (ONCA),[22] which will be relevant to corporations without share capital, including higher education institutions, is yet to be enacted.[23] The ONCA will have a significant impact on not-for-profit companies, including public higher education institutions in Ontario. Amongst other things, the ONCA sets out the fiduciary duties and the duties of care and skill for not-for-profit organisations in Ontario, which will include higher education institutions.[24]

The corporate governance framework in Canada[25] is similar to that in South Africa and is principles-based, which differs from the mandatory regime in the USA.[26] All for-profit-companies and especially listed companies in Canada are subject to various other corporate law statutes that also affect their corporate governance.[27] Corporate governance regulation in Canada is partially enabling[28] and fragmented[29] and consists of statutes like the CBCA and the OBCA and securities legislation. The regulation of directors is contained in the CBCA, OBCA as well as the ONCA. A similarity between the USA, Canada and South Africa is the inclusion of a business judgment rule in legislation, although it differs between jurisdictions. An important

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[21] This will include higher education institutions. See para 5.5.1 below for a discussion of higher education in the USA.

[22] Ontario Not-For-Profit-Corporations Act S.O 2010. Hereinafter referred to as the ONCA. Once in force, it will provide a modern legal framework for not-for-profit corporations, including charitable corporations. It is discussed more fully in clause 5.4 below.

[23] The ONCA was passed in 2010 but has not yet come into operation.

[24] The ONCA is discussed more fully in para 5.2.3 below.

[25] See para 5.3.2 below for a discussion of the corporate governance framework in Canada.

[26] See para 5.2.4 below for a discussion of the corporate governance framework in the USA.

[27] Beside the OBCA and the CBCA, the Insurance Act R.S.O. 1990 C I.8; Income Tax Act R.S.O. C I.2; Charities Accounting Act R.S.O. 1990 c.C10 to name a few.

[28] Anand 2006 (31) *Delaware Journal of Corporate Law* 234.

[29] Du Plessis (ed) *et al. Principles of Contemporary Corporate Governance* 380.

difference is that the rule has been partially codified in the Companies Act of 2008 in South Africa,[30] and in Canada generally (by federal law)[31] and in Ontario specifically (by provincial legislation),[32] in conjunction with the common law, while in the USA common law is still also relied on.[33] The business judgment rule originated in the USA, and its interpretation there has influenced its application in both Canada and South Africa.[34]

Similar to the situation in Canada, the regulation of higher education in the USA is left to the states rather than being federally governed. Control of public higher education institutions in the USA has been achieved through the creation of external governing boards.[35] These boards are very similar to those in Canada. Public higher education[36] institutions in Georgia have a considerable amount of institutional autonomy and are governed by the Georgia Board of Regents,[37] which is the counterpart of the South African Department of Higher Education and Training.[38] The Board of Regents allows its public universities to manage themselves as they deem fit, in the best interests of the institution, and will only undertake an investigation into the affairs of an institution if it considers it necessary. This includes the

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[30] Section 76(4) of the Companies Act of 2008.

[31] Section 123 of the CBCA.

[32] The common law is still applied in both South Africa and Canada. See s 135 of the OBCA.

[33] Pinto AR and Branson DM Understanding *Corporate Law* 4th ed (Lexis Nexis 2013) 3.

[34] The Business Judgment Rule is discussed more fully in para 5.4 below.

[35] Fowles J *Public Higher Education Governance: An Empirical Examination* (Published Doctoral thesis University of Kentucky 2010) 1.

[36] As in South Africa, private institutions are also corporations.

[37] See http://www.usg.edu/regents/ for more on the Board of Regents (Date of use: 28 August 2018). Now it should be mentioned that the Board of Regents does not govern any private higher education institutions.

[38] Higher Education is discussed more fully in clause 5.5.1 below.

institutions being responsible for choosing their own form of institutional governance.[39]

Higher education in Canada is not federally controlled. Instead, its regulation is left up to the provinces.[40] In Ontario, the Ministry of Training, College and Universities are responsible for the administration of laws relating to higher education. This Ministry is similar to the Department of Higher Education and Training in South Africa (DHET), except for the fact that the Ontario Ministry does not involve itself in universities' activities or their management. Most importantly, the Ontario Ministry has no power to place universities under administration or to dissolve their boards[41] as in South Africa.[42] Institutional governance of universities is in some instances similar to the position in South Africa, but it seems that institutions have higher levels of autonomy to manage their own affairs than is the case in South Africa. There are various examples of Ministerial overreach in South Africa; the impact this has on public higher education in South Africa is an overregulated system of higher education. However, considering the current state of public higher education institutions, there might be a need for more regulation in South Africa than in other jurisdictions.[43] The Ontario Ministry will not involve itself in the affairs of public universities unless it is requested to do so, and does not have the authority or power to take over

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[39] See the Board of Regents Policy Manual s 2.7.

[40] Shanahan T, Nilson M and Broshko L *The Handbook of Canadian Higher Education* Law (McGill-Queen University Press 2016) 11.

[41] The Board is the counterpart of the Council in South African universities.

[42] See https://www.ontario.ca/page/ministry-training-colleges-universities (Date of use: 28 August 2018). This is discussed more fully below in para 5.5.2.

[43] For example, in 2015 Blade Nzimande, Minister of Higher Education and Training, announced a 0% fee increase for 2016 but admitted that it was not known where the shortfall would come from. Furthermore, the decision to investigate the affairs of a university and/or place an institution under administration is that of the Minister. Another example is the proposed implementation of the Central Application System (CAS) where the Ministry will provide for a central point for all higher education applicants. They will therefore provide for the oversight and administration of all applications, ensuring a certain amount of control of the administration and placement of students.

the management of a university in the event of any allegations of mismanagement.

5.2 THE LEGAL SYSTEM OF CORPORATE LAW AND CORPORATE GOVERNANCE IN THE USA

5.2.1 Introduction to the American legal system

Like South Africa and Canada, the American legal system also has an English heritage[44] and is based on principles found in the English common law.[45] Although the Constitution and other statute laws supersede common law, the courts still apply common law principles.[46] The Constitution of the United States[47] was adopted in 1787 and ratified in 1788,[48] is the supreme law[49] of the land. It is one of the oldest written constitutions of the western world.[50] The USA Constitution provides certain powers to the federal

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[44] The USA was founded as a union of three colonies that claimed independence from the British Crown in 1776 where the Declaration of Independence also originated from.

[45] Hall KM, Wiecek WM and Finkelman P *American Legal History* 2nd ed (Oxford University Press 1996) 4.

[46] The common law will be considered where there is no legislation by Congress, where there are voids, or the Constitution is silent. See the United States Department of State "Outline of the US Legal System" (2004) 7 http://ufdc.ufl.edu/AA00011695/00001 (Date of use: 28 August 2018).

[47] Hereinafter referred to as the USA Constitution. http://constitutionus.com/ (accessed: 13 July 2016). For more on the American Constitution in general, see Chemerinsky E *Constitutional Law: Principles and Policies* 5th ed (Wolters Kluwer 2015).

[48] United States Department of State "Outline of the US Legal System" (2004) 7. See http://usa.usembassy.de/etexts/gov/outlinelegalsystem.pdf (Date of use: 28 August 2018). The Declaration of Independence authored by Thomas Jefferson, was signed in 1776. Although it has no binding authority, it is often invoked by courts and played a role in the Constitution that was later promulgated. See Chemerinsky *Constitutional Law: Principles and Policies* 9.

[49] Article VI of the USA Constitution states this.

[50] The USA Constitution organises the USA's basic political institutions and comprises seven articles. The Constitution is based on the separation of powers of the legislative, executive and judicial branches of government. See in general, Von Mehren AT and Murray PL *Law in the United States* 2nd ed (Cambridge, 2007) 103; Duigen B *The US Constitution and Constitutional law* (Brittannica Education Press 2013). 3 – 9. In *Marbury v Madison* 5 (1803) US (1 Cranch) 137 it was ruled that the federal judiciary may review the constitutionality of actions taken by the legislative and executive

government and other powers to the various states.[51] The executive powers have not only been granted in terms of the USA Constitution, but also by the implied separation of powers doctrine.[52] The USA Bill of Rights plays a central role in American law and government and remains a fundamental symbol of the freedoms and culture of the nation.[53] States have their own legislative, executive and judicial branches. The states are therefore

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branches of the national government. See May CN and Ides A *Constitutional Law: National Power and Federalism* (Aspen Law and Business 1998) 2; 9 – 12.

[51] Von Mehren and Murray *Law in the United States* 103.

[52] Each branch was provided with certain responsibilities, but to ensure that no branch became too powerful, the USA Constitution embedded various ways in which the branches can oversee each other. The USA firmly believes in the rule of law and opted for a system where the three basic functions of government namely legislative, executive and judicial were divided among three separate and coordinated branches of government. For more on the separation of powers, see in general http://www.usconstitution.net/consttop_sepp.html (Date of use: 28 August 2018). This implied doctrine views federal powers as divided among the judicial, executive and legislative branches. See Weaver RL *et al. Inside Constitutional Law: What Matters and Why* (Wolters Kluwer 2009) 93. The doctrine also governs how the branches share power and work together cooperatively. See in general, Duigen *The US Constitution and Constitutional Law* xiii; and United States Department of State "Outline of the US Legal System" (2004) 7; http://ufdc.ufl.edu/AA00011695/00001 (Date of use: 28 August 2018).7; Keefe WJ and Ogul MS *The American Legislative Process* 9th ed (Prentice-Hall Inc 1997) 47. The division of powers among the branches was designed to create a system of checks and balances and lessen the possibility of tyrannical rule; in order for the government to act, at least two branches must agree. See Chemerinsky *Constitutional Law: Principles and Policies* 1 - 3. The rule of law is a principle in terms of which all people and juristic entities are accountable to laws that are publically promulgated, equally enforced, independently adjudicated and which are consistent with international human rights principles. See more information on the rule of law on http://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law (Date of use: 28 August 2018).

[53] See the Bill of Rights on https://www.constitutionfacts.com/content/constitution/files/Constitution_BillOfRights.pdf (Date of use: 28 August 2018). The Bill of Rights comprises of the following amendment I: freedom of religion, speech, and the press; rights of assembly and petition; amendment II: right to bear arms; amendment III: housing of soldiers; amendment IV: search and arrest warrants; amendment V: rights in criminal cases; amendment VI: rights to a fair trial; amendment VII: rights in civil cases; amendment VIII: bails, fines, and punishments; amendment IX: rights retained by the people; and amendment X: powers retained by the states and the people. For more on the Bill of Rights see in general Currie DP *The Constitution of the United States: A Primer for the People* 2nd ed (The University of Chicago Press 2000) 10 – 12; 26. For a discussion of the South African Bill of Rights, see Chapter 2, para 2.2.2 above. The Constitution provides the central government with a limited list of powers. For more on federalism in general, see Backer *Comparative Corporate Law: United States, European Union, China and Japan* 64. "Federalism" generally refers to the vertical division of authority; Chemerinsky *Constitutional Law: Principles and Policies* 3. The matter of *McCulloch v Maryland* 1819 was a landmark case for federalism in the USA.

empowered to pass, enforce and interpret laws as long as they are not in violation of the USA Constitution.[54] USA federalism was established in the Tenth Amendment of the Constitution.[55] In terms of these provisions, national powers are delegated.[56] Federal authority is limited to the powers granted to it by the USA Constitution. The authority of the states, on the other hand, consists of all the powers not granted to the federal government.[57] Furthermore, the powers of the federal government are regulated by the principles of separation of powers and concurrent authority.[58] Although significant authority was granted to the federal authority, broad powers were also granted to the states.[59] The supremacy clause in the Constitution forbids any state law to contradict either the USA Constitution or the Federal law. [60]

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[54] For more on federalism, see in general, http://system.uslegal.com/federalism/ (Date of use: 28 August 2018); *Fletcher v Peck* 10 US (6 Cranch) 87 (1810) where the federal judiciary for the first time struck down a state law on the ground that it violated the USA Constitution. See May and Ides *A Constitutional Law: National Power and Federalism* 18.

[55] Backer *Comparative Corporate Law United States, European Union, China and Japan: Cases and Materials* 557 – 571; and more specifically the matter of *Louis K. Ligget Co. v Lee*, 288 US 517, 53 S Ct. 481 (1933).

[56] Keefe and Ogul *The American Legislative Process* 49 - 50.

[57] Tenth amendment to the USA *Constitution* states the following: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

[58] Von Mehren and Murray *Law in the United States* 105.

[59] Von Mehren and Murray *Law in the United States* 106. These powers are encapsulated in each states' Constitution.

[60] Article VI, para 2 of the USA Constitution is commonly referred to as the "supremacy clause." It establishes that the federal Constitution will take precedence over state laws and even state constitutions. The origins of the law of federal supremacy can be traced back to the opinions of the two judges in the matters of *McCulloch v Maryland* 17 US (4 Wheat) 316 (1819) and *Gibbons v Ogden* 22 US (9 Wheat) 1 (1824). In general, see May and Ides *Constitutional Law: National Power and Federalism* 217 – 231.

5.2.2 Corporate Law in Georgia

(a) Background and incorporation of a corporation

The federal government of the USA has the power to pass corporate law through the commerce clause in article 1, section 8 of the USA Constitution.[61] However, regulation of corporate law is usually left up to individual states, with securities regulation as their federal counterpart.[62] Corporation laws are general, and the incorporator decides as to which state the corporation will be incorporated in. This means that a corporation does not need to be incorporated in the state that it is situated in. Each corporation will thus be formed in terms of the corporate laws of its chosen state of incorporation.[63] Corporations are subject to the internal affairs doctrine.[64] This doctrine prescribes *among* other things how the internal affairs relating to the directors, shareholders and officers are governed by the state law of incorporation.[65] In selecting a jurisdiction to incorporate in,

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[61] Winship V "Teaching Federal Corporate Law" 2013 (8) *Journal of Business & Technology Law* 218. See article 1, s 8 of the USA Constitution https://www.law.cornell.edu/constitution/articlei#section8 (Date of use: 28 August 2018). See Watkins MW "Federal Incorporation (II)" 1918-1919 *Michigan Law Review* 145 – 164 regarding history of the Congress's power over commerce. For more on the commerce clause in general, see https://www.britannica.com/topic/commerce-clause (Date of use: 28 August 2018).

[62] Winship 2013 *Journal of Business & Technology Law* 217; Pinto and Branson *Understanding Corporate Law* 3; Park JL "Reassessing the Distinction Between Corporate and Securities Law" 2017 *UCLA Law Review* 118 – 182.

[63] Tung F "Before Competition: Origins of the Internal Affairs Doctrine" 2006 *Iowa J Corp*.

[64] Backer *Comparative Corporate Law: United States, European Union, China and Japan* 165.

[65] Harvard Law Review "Internal Affairs doctrine: Theoretical Justifications and Tentative Explanations for its continued Primacy" 2002 1480. For more on the internal affairs doctrine, see in general Stevens M "Internal Affairs Doctrine: California versus Delaware in a Fight for the Right to Regulate Foreign Corporations" 2007 *BCL Rev* 1047 - 1087; Beveridge NP "The Internal Affairs Doctrine: The Proper Law of a Corporation" (1989) *The Business Lawyer* 693 - 719; Balouziyeh JMB *A Legal Guide to United States Business Organizations: The Law of Partnerships, Corporations and Limited Liability Corporations* 2nd ed (Springer 2013) 50; Tung (2006) *Iowa J Corp L* 39 - 51; Choi SJ and Guzman AT "Choice and Federal Intervention in Corporate Law" 2001 *Virginia Law Review* 931.

a corporation will select corporate law rules that maximise the interests of shareholders. Therefore, corporations have strong incentives to choose to incorporate in a state that maximises shareholder welfare.[66] Any disputes relating to a corporation's internal affairs will be dealt with in accordance with the law of the incorporating state.[67] Many corporations tend to incorporate primarily in the state of Delaware because of the benefits of incorporation in this state.[68] For instance, four[69] of the largest companies situated in the State of Georgia are incorporated in the State of Delaware.[70] In contrast, in South Africa, all companies must be registered and

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[66] Choi and Guzman 2001 *Virginia Law Review* 961 – 962.

[67] The USA has a tradition of regulating corporate governance at state level, as reflected in *Cort v Ash* 422 US 66, 84 1975. In this Supreme Court judgement, the following was confirmed: "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." See in general, Winship 2013 *Journal of Business & Technology Law* 218; Gordon JN and Ringe WG *The Oxford Handbook on Corporate Law and Governance* (Oxford University Press 2018) 1065.

[68] The focus of the comparative analysis of the US is the state of Georgia. But, briefly, there are a few reasons for companies to incorporate mainly in the state of Delaware: the first is that the transaction cost explanation of the corporate charter provides a different perspective on state competition. Delaware's persistent large market share is maintained by a first-mover advantage created by the reciprocal relation that develops between the chartering state and firms due to their substantial investments in assets that are specific to the chartering transaction. Transactions between a firm and its state of incorporation extend over a long period, and reincorporation in another state is not costless. Secondly, a state with a favourable corporation code must guarantee its codes' continued responsiveness to be successful in the corporate charter market. Delaware is best positioned to commit itself to responsiveness because it has so much to lose. Thirdly, Delaware's constitutional provision mandates that all changes in the corporation code must be adopted by a two-thirds vote of both houses of state legislation. This then makes it difficult to renege on existing provisions in the state code. Fourthly, Delaware also has a high proportionate franchise tax and invests in assets that can be characterised as legal capital. The combination of all these factors creates an intangible asset with various qualities, a reputation for responsiveness that firms weigh in their incorporation. See Backer *Comparative Corporate Law: United States, European Union, China and Japan* 184 – 187; Greenfield K "Democracy and the dominance of Delaware in Corporate Law" (2004) *Law and Contemporary Problems* on Delaware's supremacy; Stevens 2007 *Boston College Review* 1066 – 1076.

[69] Delta Airlines Inc, Coca-Cola Inc, United Parcel Service Inc and Home Depot Inc.

[70] Harowitz D and Leaf P "The Internal Affairs Doctrine Versus a Conflicting Contractual Choice of Law Provision" *Bloomberg BNA Corporate Accountability Report* (2012) 2; for an application of the internal affairs doctrine see *Rosenmiller v Bordes* 607 A.2d 465 468 -69 (Del. Ch 1991). Also, see Tung F *Iowa J Corp L* 2 - 6.

incorporated in terms of the Companies Act of 2008, and are subject to the provisions of this Act.[71] The incorporation of a corporation in the state of Georgia is discussed below in more detail.[72]

(b) The Model Business Corporations Act (MBCA)

One of the most influential acts relating to corporate law in the USA is the MBCA.[73] The Committee on Business Corporations of the American Bar Association published the revised Model Business Corporations Act in 1950.[74] The primary purpose of the MBCA was to assist the states in amending their own business corporation statutes.[75] The MBCA was designed as a general corporation statute that can be enacted by a state legislature and applies to for-profit business corporations. The MBCA is devoted to the internal affairs of a corporation which includes the inter-relationship of the corporation, its shareholders, directors and the corporation's relationship with the state.[76] This Act also prohibits certain forms of management conduct and relies on fiduciary duties to assist in the

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[71] See Chapter 4, para 4.2 above.

[72] See para 5.2.3(c) below.

[73] In 1928, the *Commissioners on Uniform State Laws* promulgated the Uniform Business Corporations Act, which was adopted by only three states, namely Louisiana, Washington and Kentucky. For more on this Act, see in general Wilson JR "The Uniform Business Corporations Act" 1947(1) *Texas Law and Legislation* 309 – 330; American Bar Association *Model Business Corporation Act – Official Text with Official Comment and Statutory Cross-References revised through 2002* xix – xx. The MBCA played an important role in forming corporate law in Georgia. See Campbell W "The Model Business Corporations Act" 1956 *The Business Lawyer* 98 – 99 for a discussion of its origin and purpose.

[74] It was called "revised" to distinguish it from the 1946 version. See Garrett R "History, Purpose and Summary of the Model Business Corporation Act" 1950 *The Business Lawyer* 1.

[75] American Bar Association *Model Business Corporations Act: Official Text with official comment and statutory cross-references revised through 2002* xxi – xxii; Hanks JJ and Scriggings LP "Protecting Directors and Officers from Liability – The Influence of the Model Business Corporations Act" 2000 *The Business Lawyer* 15.

[76] Steadman CW "Liabilities of Directors under the Model Business Corporation Act" 1952 *The Business Lawyer* 9. For more on the internal affairs doctrine, see para 5.2.3(a) above.

management and effective corporate governance of companies.[77] It is up to each state to enact its own state corporate law legislation. The state of incorporation of a corporation will, therefore, govern all aspects of corporate law, including finance, governance and the powers of the corporation.[78] The MBCA has no legal force unless it is enacted by a state legislature since the enactment of the MBCA by state legislature is voluntary, states often adopt versions of the MBCA that have been slightly revised to reflect local circumstances. A state may also choose to adopt only a portion of the MBCA and complete its body of corporate law by including either locally drafted legislation or legislation that has been borrowed from another state's corporate law.[79]

(c) The Georgia Code

Georgia was one of the first colonies that gave full recognition to the English common law relating to corporations.[80] The first Georgia Code was passed in 1968 and was based on the MBCA.[81] The Georgia Code of 2017 provides for the incorporation of corporations, partnerships and associations.[82] The formation of a corporation in Georgia is a formal process whereby the incorporators file the corporation's articles of incorporation with a state official in accordance with title 14 of the Georgia

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[77] Branson DM "Recent Changes to the Model Business Corporation Act: Death Knells for Main Street Corporation Law" 1993 *Nebraska Law Review* 259.

[78] See para 5.2.3(a) for more on the internal affairs doctrine and the incorporation of a corporation in the USA.

[79] Bainbridge SM *Corporate Law* 2nd ed (Thomson Reuters 2009) 1 – 8 for incorporation in terms of the MBCA.

[80] The first corporations were educational, eleemosynary and non-profit.

[81] Carney WJ "Change in Corporate Practice under Georgia's New Business Corporation Code" 1989 *Mercer Law Review* 656.

[82] Georgia Code of 2017, title 14 https://law.justia.com/codes/georgia/2017/title-14/ (Date of use: 31 July 2018). For the remainder of this chapter, only the relevant sections will be indicated. However, this research, focus on corporations, is contained in Chapter 2 of title 14 of the Georgia Code of 2017. The other type of business entities will not be discussed.

Code of 2017.[83] The general powers of a company are contained in paragraph 14-2-302 of the Georgia Code of 2017.[84] The information relating to shareholders is provided in paragraph 14-2-7, while directors are dealt with in paragraph 14-2-8. The control and management of a corporation in Georgia are vested in its board of directors.

(d) Directors and officers

The Georgia Code of 2017 provides for both officers and directors.[85] This Code differs significantly from the previous versions of the Code after the Governor of Georgia signed the House Bill 192 into law.[86] The Georgia Code now provides for a codified version of the business judgment rule.[87] This rule applies to officers and directors of Georgia corporations, including officers and directors of financial institutions.[88] In terms of the Georgia Code of 2017, all corporate powers shall be exercised by or under the authority of the board of directors of the corporation, and the business and affairs of the corporation shall be managed by or under the direction, and subject to oversight, of its board of directors, subject to any limitation

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[83] Georgia Code of 2017 §14-2-201.

[84] Georgia Code of 2017 §14-2-302.

[85] Georgia Code of 2017 §14-2-8 for both directors and officers.

[86] The Bill was passed in May 2017, and it came into effect on 1 July 2017. See in general Eversheds Sutherland "Georgia Governor Signs into Law Revisions to Business Judgment Rule, Codifying Protections for Banking and Corporate Officers and Directors" https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/199370/Legal-Alert-Georgia-Governor-Signs-into-Law-Revisions-to-Business-Judgment-Rule-Codifying-Protections-for-Banking-and-Corporate-Officers-and-Directors (Date of use: 1 August 2018).

[87] In terms of this rule, directors and officers are afforded a presumption of good faith and ordinary care in the performance of their duties. See in general Shu-Acquaye F "American Corporate Law: Director's Fiduciary Duties and Liability during Solvency, Insolvency and Bankruptcy in Public Corporations" *UPR Business Law Journal* 8 – 9. The business judgment rule is discussed more fully in para 5.4 below.

[88] Sowers TE "Business Judgment Rule in Georgia Strengthened By New Law" *Berman Fink Van Horn P.C. Attorneys* https://www.bfvlaw.com/business-judgment-rule-in-georgia-strengthened-by-new-law/ (Date of use: 31 July 2018).

outlined in the articles of incorporation.[89] The articles of incorporation may also prescribe qualifications for directors. The board of directors must consist of one or more individuals, with the number specified in accordance with the articles of incorporation. This differs slightly from the situation in South Africa, where the Companies Act of 2008 specifies in section 66(2) that a private company or a limited liability company must have at least one director while a public or non-profit company must have at least three directors. The MOI may specify a higher number of directors.[90] The Georgia Code of 2017 provides for the term that a director may serve in a corporation. Accordingly, the terms of the initial directors expire at the first shareholders' meeting at which directors are elected. Thereafter the terms of all other directors will expire at the next annual shareholders meeting following their election. The position in South Africa is different, as directors may serve for indefinite terms.[91] The Georgia Code of 2017 provides for the resignation of directors as well as the removal of directors.[92] In South Africa, both the board of directors and the shareholders may remove a director whereas in Georgia a director may only be removed by a shareholder. The shareholders may remove a director with or without cause unless the articles of incorporation or a bylaw adopted by the shareholders provide that directors may only be removed for a cause.[93] A vacancy may be filled by either the shareholders or directors, which is similar to the position in South Africa.[94] In Georgia, a board of directors may determine the remuneration of directors unless the

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[89] Georgia Code of 2017 §14-2-805.

[90] A MOI is similar to articles of incorporation in the USA. See Chapter 4, para 4.2 for more on the South African Companies Act of 2008.

[91] Georgia Code of 2017 §14-2-801; s 68 of the South African Companies Act of 2008.

[92] Georgia Code of 2017 §14-2-807 and §14-2-808.

[93] Chapter 4, para 4.2.9 above for a discussion of the removal of a director in terms of the Companies Act of 2008; Georgia Code of 2017 §14-2-808. The removal of directors in the USA is dealt with in para 5.2.3 below.

[94] Georgia Code of 2017 §14-2-810. See s 70 of the South African Companies Act of 2008.

articles of incorporation provide otherwise. In South Africa, the remuneration of directors must be paid in accordance with a special resolution.[95] The board of directors may appoint officers and may assign the responsibility for preparing the minutes of the directors and shareholders' meetings and for maintaining records of the incorporation to an officer of the corporation.[96] It seems that the Georgia Code makes a distinction between officers and directors: officers are not perceived to be equal to directors, which differs from the position in South Africa. In South Africa, officers are perceived to be equal to directors.[97]

(e) Duties of directors

Duties of corporate officers and directors are determined by state law, but in general, it is accepted that there are three basic duties in the USA,[98] namely, the fiduciary duties of care and diligence,[99] loyalty[100] and obedience.

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[95] Georgia Code of 2017 §14-2-811. See s 66(8) and (9) of the South African Companies Act of 2008.

[96] Georgia Code of 2017 §14-2-840.

[97] The Companies Act of 2008 provides a definition of "prescribed officer" as follows: "prescribed officer" means a person who, within a company, performs any function that has been designated by the Minister in terms of section 66(10) of the Act. See Chapter 4, para 4.4.2 above for a discussion on prescribed officers. The functions of officers are contained in the Georgia Code of 2017 §14-2-841. The focus of this research will remain on directors. Officers, however, also have a standard of conduct, presumption of good faith and ordinary care; see §14-2-842.

[98] Knepper and Baily *Liability of Corporate Officers and Directors* 11.

[99] Brodsky E and Adamski MP *Law of Corporate Officers and Directors: Rights, Duties and Liabilities* (West 2009) 2-1 – 2-43 for a full discussion of the duty of care. Cassidy (2009) *Stellenbosch Law Review* 387. See further Loos (ed) *Directors' Liability: A Worldwide Review* 109 for a further discussion about the duty of care in the USA. The duty of care requires directors to perform their duties with the necessary diligence required of a reasonable person in similar circumstances, which may vary, depending on the context. This duty has four sub-duties: the duty to monitor, the duty to inquire, the duty to be informed and the duty to make reasonable decisions. See *In re Citigroup Inc. Shareholder Derivative Litigation* 964 A2d 106 (Del. Ch 2009) where an action was brought by the shareholders claiming that the board of directors breached their fiduciary duty to the company. However, this claim was rejected by the court. See Miller GP *The Law of Governance, Risk Management and Compliance* (Wolters Kluwer 2014) 49 – 53; Loos (ed) *Director's Liability: A Worldwide Review* 110 for a discussion of the latter case. In general see, Fanto JA *Director's and Officer's Liability* 2nd ed (Practicing Law Institute 2014) for more on the duty of care see pages 2-36 – 2-

Upon accepting the office of director or officer of a corporation, a person assumes a duty of loyalty to the company and its shareholders, and a duty to act with care in fulfilling his or her responsibilities. In the USA, the duty of care is considered a fiduciary duty, as opposed to Canada and South Africa, where it is regarded as a separate duty.[101] In the USA, Courts have identified the duty of care and the duty of loyalty as the primary fiduciary duties of directors. As long as directors comply with these duties, they will be entitled to protection in terms of the business judgement rule.[102] The duty of care requires directors and officers to consider all available information to them when overseeing the corporation's business.[103] Directors can be

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43; Cahn and Donald *Comparative Company Law* 332 – 338 for more on the duty of care as well as Hansen 1993 *The Business Lawyer* 1355 – 1360; Brodsky and Adamski *Law of Corporate Officers and Directors* pages 2-1 – 2-61 for more on the duty of care.

[100] For more on the duty of loyalty see in general Cahn and Donald *Comparative Company Law* 332 – 347. In the matter of *Guth v Loft Inc* 5 A 2d 503, 510 a director's duty of loyalty towards the company was considered. The director of a candy company took an opportunity for himself to purchase the recipe of Pepsi Cola instead of purchasing it for the benefit of his company. The company explained the legal position as follows, "corporate officers and directors are not permitted to use their position of trust and confidence to further their private interest. A public policy has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would cause injury to the corporation, or to deprive it of profit or advantage which has skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest." See also *In re Southern Peru Copper Corp. Shareholder Derivative Litigation* 30 A.3d 60 (Del. Ch. 2011).

[101] D'Silva ALW and Wood G "Director's Duties in Canada: Six Key Concepts" May 2015 http://www.canadianmandalaw.com/directors-duties-in-canada-six-key-concepts/ (Date of use: 28 August 2018).

[102] The business judgment rule in Georgia has now been codified. This is discussed more fully in para 5.4 below. Forrester and Feber *Fiduciary Duties and Other Responsibilities of Corporate Directors and Officers* 13.

[103] Brodsky and Adamski *Law of Corporate Officers and Directors: Rights, Duties and Liabilities* 2-11; Forrester and Feber *Fiduciary Duties and Other Responsibilities of Corporate Directors and Officers* 15. It is important that directors make informed decisions. They need to obtain and consider all relevant information; they need to take time to evaluate and consider the information; ask questions and probe assumptions; understand the terms of the transactions; enter into discussions regarding the transaction or matter; understand the corporations' financial statements and standing; review and monitor the performance of the CEO as well as other senior managers; and remain informed about the corporations' operations. See in general *McEwen V Kelly* 140 GA; *Shannon et al. v Mobley 166 GA 430 – 436 (1928);* Shu-Acquaye *University of Porto Rico Business Law Journal* 4 – 5. The MBCA states in s 8 that all corporate

responsible for both malfeasance[104] and nonfeasance.[105] The MBCA version of the duty of care is that directors must discharge their duties in good faith, with the care that an ordinarily prudent person in a similar position would exercise under similar circumstances, and in a manner reasonably believed to be in the best interests of the corporation.[106] The Georgia Code of 2017 makes provision for a director's standard of conduct in paragraph 14-2-830; which states:

> (a) A director shall perform his/her duties as a director in good faith and with the degree of care an ordinary prudent person in a like position would exercise under similar circumstances.
> (b) In performing his/her duties a director may rely upon: (1) other officers, employees or agents of the corporation whom the director reasonably believed to be reliable and competent in the functions performed; and (2) information, data, opinions, reports or statements provided by officers, employees, agents of the corporation, legal counsel, public accountants, investment bankers or other persons as to matters involving the skills, expertise or knowledge reasonably believed to be reliable and within such person's professional or expert competence.

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powers shall be exercised by or under the authority of the board of directors of the corporation and the business and affairs of the corporation shall be managed by or under the direction and subject to the oversight of the board of directors.

[104] This refers to wrongdoing, especially by a public official. See in general, Pinto and Branson *Corporate Law* 223 – 224.

[105] This refers to failure to perform an act required by law. See in general, Pinto and Branson *Corporate Law* 221 – 222.

[106] Section 8.30 (a) of the MBCA. The 2005 amendments to the MBCA resulted in a revised section 8.01 (b) to make clear that "the business and affairs of the corporation shall be managed by …. and subject to the oversight, of its board of directors." It also added a new section 8.01 (c) which states the following, "these responsibilities include attention to business performance and plans; major risks to which the corporation is or may be exposed; the performance and compensation of senior officers; policies and practices to foster the corporation's compliance with law and ethical conduct; preparation of the corporation's financial statements; the effectiveness of the corporation's internal controls; arrangements for providing adequate and timely information to directors; and the composition of the board and its committees, taking into account the important role of the independent directors." There was also an amendment to the standard of conduct and section 8.30(c) was added thereby codifying a director's obligation to disclose to the board information known to the director to be material to the board's decision making and oversight function. It furthermore added section 8.42(b) which provides for an officer's obligation to inform superior officers or the board of directors about material information and material violations of law known to him or her. See Olson JF and Briggs AK "The Model Business Corporation Act and Corporate Governance: An Enabling Statute moves toward normative standards" 2011 *Law and Contemporary Problems* pages 31 – 38 for more on how the MBCA changed director's conduct.

> (c) There shall be a presumption that the process a director followed in arriving at decisions was done in good faith and that such director has exercised ordinary care; provided, however, that this presumption may be rebutted by evidence that such process constitutes gross negligence by being a gross deviation of the standard of care of a director in a like position under similar circumstances."
> (d) Nothing in this section shall:
> (i) In any instance when fairness is an issue, such as consideration of the fairness of a transaction to the corporation as evaluated in §14-2-861, after the burden of proving the fact or lack of fairness otherwise applicable;
> (ii) Alter the fact or lack of liability of a director under the Georgia Code, including the governance of the consequences of an unlawful distribution under §14-2-832 or a conflicting interest transaction under §14-2-861;
> (iii) Affect any rights to which the corporation or its shareholders may be entitled under another law of the state or of the United States; or
> (iv) Deprive a director of the applicability, effect, or protection of the business judgment rule.

Furthermore, the duty of care requires directors to undertake certain responsibilities and not to be negligent in performing these duties. Directors must, at all times, make informed decisions. In the event of directors violating their duty of care by making negligent or ill-advised decisions, they can be liable for malfeasance.[107] The duty of care sets a standard of conduct while the business judgment rule limits judicial inquiry into business decisions and acts as protection for directors who are not acting negligently. For liability to be incurred, the negligence must be the

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[107] Shu-Acquaye *University of Porto Rico Business Law Journal* 3 – 9; Hansen 1993 *The Business Lawyer*; Pinto and Branson *Understanding Corporate Law* 221; *Francis v United Jersey Bank* 432 A.2d 814 (NJ 1981). The case involved a family owned corporation, which operated as a reinsurance broker. The brokers of this firm decided to sell some of the risks of their corporation to other insurance brokers thereby facilitating the diversification of those risks. These transactions resulted in the reinsurance brokers holding funds for the insurance companies whilst industry practice required segregation of funds. The Pritchard sons ran the corporation together with their mother, Mrs Pritchard who was a director of the company, while her sons formed part of the management. However, she chose to leave the business to her sons. The sons channeled the various insurance companies' funds into a single account and then personally borrowed from the account without subsequent repayment. The trustee sued Mrs Pritchard for breach of her duty of care. In confirming that she had breached this duty, the court confirmed that directors should have some sort of understanding of the business, keep informed about activities, perform general monitoring, including attendance of meetings and be familiar to a certain extent with the financial statements of the corporation. The court also held that the duties of directors of publically traded corporations are greater than those of directors of other corporations.

proximate cause of the loss. The plaintiff bears the burden of proof in respect of the amount of loss or damages.[108] The duty of care requires a director to act in good faith and base a business decision on adequate information.[109] A director's negligence is determined on by the facts and on a case-by-case basis.[110] The duty of good faith prohibits conduct that is motivated by an intent to impede, interfere with or harm the company in any way. A certain standard is also expected of directors in fulfilling their responsibilities. These responsibilities consist of two basic functions, namely, decision-making[111] and an oversight function.[112] In the case of *In re*

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[108] Pinto and Branson *Understanding Corporate Law* 225 – 227. In the matter of *Smith v Gorham* 488 A.d 858 (Del. 1985), the Delaware Court held that the directors had breached their duty of care and were not protected by the business judgment rule. In this matter, the company was trying to figure out ways to raise their stock, but no action was taken. Mr. van Gorham the Chairman of the Board as well as the CEO took it upon himself to contact an investor, Mr. Pritzker, without the prior knowledge of the Board of Directors. Mr. Pritzker agreed to buy the company for $55 a share. This price was, however, at least 40% higher than the current market price. There was some opposition to the offer from some of the other officers. A meeting was called which took place without proper notice. After only meeting for approximately two hours, the board decided to accept the offer and present it to the shareholders. The Board received limited advice from any financial expert or advisor. The court, in making its decision, used the concept of gross negligence as "the proper standard for determining whether a business judgment reached by the board of directors was an informed one". The court found that the directors were grossly negligent in being uninformed of the value of the company or van Gorham's role in forcing the sale and establishing the price and approving the sale after only two hours without proper notice or reason for such an urgent meeting.

[109] Brodsky *Law of Corporate Officers and Directors: Rights, Duties and Liabilities* 2:12.

[110] Where directors make decisions likely to affect shareholder wealth, the duty of care requires that the decisions be made on the basis of reasonable diligence. Directors, however, are given wide discretion within which they may act without fear of liability under the business judgment rule. The business judgment rule does not apply when the director has a conflict of interest or has breached his/her duty of care. Traditionally, the duty of care requires that directors act as reasonable people under all circumstances involving a deliberative decision-making process based on credible information. See Brodsky *Law of Corporate Officers and Directors: Rights, duties and liabilities* 2:2; Knepper and Baily *Liability of corporate officers and directors* 91.

[111] This function usually pertains to periodic attention to corporate systems and controls, policy issues or any matter necessitating a director's inquiry.

[112] This function usually pertains to the formulation of corporate policy and strategic corporate goals. When carrying out their duties, directors are expected to act in good faith, in the best interests of the company and with the necessary care that a person in a similar position would reasonably deem appropriate. In some states, the fiduciary duty of care to the company and its stakeholders is defined by a judicial doctrine while in other states the statutory formulations replace or supplement the common law. For

Walt Disney Co. Derivative Litigation[113] the Delaware Court of Chancery found that the officers and directors of Disney did not breach any fiduciary duties by offering employment to a new president, only to fire him a year later.[114] In *Brock Built LLC v Blake* [115] the Georgia Appeals Court dealt with a claim for breach of fiduciary duty by a director. The court found that mere negligence does not amount to a breach of fiduciary duty.[116] This is similar to the provisions of section 76 of the Companies Act of 2008, except that the South African version is much clearer regarding the degree of skill necessary.[117]

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those states that have adopted the MBCA, section 8.30 prescribes the standards of conduct for directors. See Shue-Acquaye 2011 *UPR Business Law Journal* Vol 2 5. In *Smith v. Van Gorkom 488 A.2d 858*, the Delaware Supreme Court held directors liable for making an uninformed decision in a case not involving personal gain, fraud or bad faith and the duty of care has taken on new significance as an actual source of liability. See Brodsky and Adamski *Law of Corporate Officers and Directors: Rights, Duties and Liabilities* 2-41.

[113] *In re Walt Disney Co. Derivative Litigation* (2005) No. Civ. A. 15452 WL 2056651 (Del. Ch). See Monks RAG and Minow N *Corporate Governance* 4th ed (John Wiley & Sons 2008) 235 on this decision.

[114] The shareholders of Disney alleged that the directors had breached their fiduciary duties in appointing Michael Ovitz in the first place, while not properly considering the offer of employment. One of the directors of Disney negotiated the employment contract with Ovitz without having proper board approval. Following his appointment, clashes between the new president and the other executives followed. The board wanted to terminate his employment, but there was no just cause, which triggered the obligation to pay Ovitz a severance package of about $140 million. The court concluded that Ovitz did not breach his fiduciary duty of loyalty by accepting his severance payment, because he did not negotiate the terms of his employment during his term of employment and he played no role in the decision to trigger the severance payment through termination without cause. The court also found that the directors did not commit wasteful expenditure because the corporation was better off without Ovitz as its president. Furthermore, the court determined that the directors did not breach any fiduciary duty related to their service at the time of Ovitz's dismissal.

[115] *Brock Built LLC v Blake* 686 S.E.2d 425 (2009) GA. Hereinafter referred to as *Brock Built v Blake*. For a summary of this case, see http://law.justia.com/cases/georgia/court-of-appeals/2009/a09a1537-0.html (Date of use: 28 August 2018).

[116] Lantta L "What's the correct fiduciary standard when a trustee controls family entity held by trust?" March 2014 http://bryancavefiduciarylitigation.com/whats-the-correct-fiduciary-standard-when-a-trustee-controls-family-entities-held-by-the-trust (Date of use: 28 August 2018).

[117] This section is discussed more fully in Chapter 4, para 4.2.5 above.

The duty of loyalty (and good faith) requires a fiduciary to act in the best interest of and in good faith to his/her corporation and shareholders[118] and to refrain from receiving improper personal benefits as a result of their relationship with the corporation. A lack of good faith may involve actual intent to harm the corporation, or an intentional dereliction of duty and a disregard for the director's duties. The duty of loyalty requires a fiduciary to act in good faith for the benefit of the company, thus meaning that this duty prohibits self-dealing, misappropriation of corporate assets, conflicts of interests, lack of independence and disloyal conduct.[119] In *Stone v Ritter*[120] the Delaware Court characterised the duty of good faith as part of the duty of loyalty. The court held that the directors had breached their duty of loyalty by failing to implement any reporting or information system controls, or where there was such a system, their failure to monitor or oversee its operation. The court found that the directors had breached their duty of loyalty by failing to institute a legal compliance system. It should be noted

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[118] Knepper and Baily *Liability of Corporate Officers and Directors* 12 on more of the duty of loyalty; Cahn and Donald *Comparative Company Law* 344 – 347 on the duty of loyalty; Hill CA and McDonnell BH "*Stone v Ritter* and the Expanding Duty of Loyalty" 2007 *Fordham Law Review* 1769 - 1796; and *Brock Built LLC v Blake* No. A09A1537 (Ga. App. Nov. 6, 2009). In South Africa, the duty is towards the company and not the shareholder directly. See Chapter 4, 4.2.5 above.

[119] *In re Walt Disney Co. Derivative Litigation* (2005) Civ. A 1552 (Del. Ch), referred to above, the court found that the directors did not breach their fiduciary duty of loyalty; Harvard Law Review Association "Corporate Law: Fiduciary Duties of Directors. Delaware Court of Chancery finds Disney Directors not liable for approval of an employment agreement providing $140 million termination payment. *In re Walt Disney Co. Derivative Litigation, no. Civ. A* 15452, 2005 WL 2056651 (Del. Ch. Aug 9, 2005)" (2006) *Harvard Law Review* 926.

[120] *Stone v Ritter* 911 A.2d 362, 370 (Del. 2006). In this matter, the shareholders brought a derivative action after it came to light that the company had paid millions in fines and penalties arising from the Federal Bank Secrecy Act. The shareholders alleged that the directors had breached their duty to act in good faith because even while the company had a programme to monitor compliance, it was not adequate enough to prevent violations which led to penalties. The Chancery Court dismissed the complaint on the basis that, as confirmed *In re Caremark International Inc. Derivative Litigation* 698 A.2d 959 (Del. Ch. 1996), "directors can only be liable in situations involving a sustained or systematic failure of the board to exercise oversight, and the Court found that the complaint did not establish the requisite lack of good faith on which to base liability." See Demetriou AJ and Olmon JT "Stone v Ritter: Delaware Supreme Court Affirms the Caremark Standard for Corporate Compliance Programs" 2007 https://www.americanbar.org/newsletter/publications/aba_health_esource_home/Volume3_06_demetriou.html (Date of use: 1 August 2018). See Hill and McDonnel 2007 (76) *Fordham Law Review* 1769 – 1796.

that corporations may not indemnify directors or officers for breaches of loyalty where the director or officer has acted in bad faith.[121]

The duty of obedience compels fiduciaries to abide by legal standards.[122] This duty derives directly from the fiduciary duty of one person acting on behalf of another.[123] Directors should not exceed the powers conferred on them by the company.[124] If directors exceed their powers, they may be personally liable.[125]

These duties are similar to the ones contained in section 76 of the Companies Act of 2008, with the notable exception that the duty of care is considered a separate duty in South Africa and is not part of the fiduciary obligation.[126]

(f) Removal of directors

One of the most important mechanisms through which shareholders control directors is the power of removal. Directors are appointed at the annual general meeting of a corporation and hold office until the next annual general meeting unless removed early. The shareholders have the power to remove the entire board or a single director, with or without cause at a shareholders' meeting in terms of the Georgia Code of 2017. The shareholders can replace the directors at the meeting or leave it up to the

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[121] Forrester and Feber *Fiduciary Duties and Other Responsibilities of Corporate Directors and Officers* 18 – 19.

[122] Palmter AR "Duty of Obedience: The Forgotten Duty" 2010 – 2011 *New York Law School Law Review* 458.

[123] Atkinson R "Obedience as the Foundation of Fiduciary Duties" 2008 (34) *Journal of Corporation Law* 48.

[124] Knepper and Baily *Liability of Corporate Officers and Directors* 11.

[125] Palmer 2010 – 2011 *New York Law School Law Review* 460.

[126] See Chapter 4, para 4.2.5 above for a discussion of the fiduciary duties and the duty of care in South Africa.

remaining directors to fill the vacancies.[127] Title 14-2-808 in the Georgia Code of 2017 makes provision for shareholders to remove directors from the board. It states that:

> (a) the shareholders may remove one or more directors with or without cause unless the articles of incorporation or a bylaw adopted by the shareholders provides that directors may be removed only for cause.
> (b) If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove him. If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal.
> (c) If cumulative voting is not authorized, a director may not be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal. If cumulative voting is not authorised, a director may be removed only by a majority of the votes entitled to be cast.
> (d) If the directors have staggered terms as provided in title 14-2-806, directors may be removed only for cause, unless the articles of incorporation or a bylaw adopted by the shareholders provides otherwise.
> (e) A director may be removed by the shareholders only at a meeting called for the purpose of removing him and the meeting notice must state that the purpose, or one of the purposes, of the meeting is removal of the director.

The Georgia Code of 2017 only provides for shareholders to remove directors, while the South African Companies Act of 2008 provides for both shareholders and the board of directors to remove directors in terms of section 71.[128] The Georgia Code of 2017 does not make provision for declaring a director delinquent, unlike the South African Companies Act of 2008.[129]

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[127] Hermance JP and Quiros PA "The Dynamics among Shareholders, Directors and Officers in Corporate Organisation under Georgia Law" 1985 (37) *Mercer Law Review* 93.

[128] See Chapter 4, para 4.2.9 above for the removal of directors in terms of the Companies Act of 2008.

[129] See Chapter 4, para 4.2.10 above for a discussion of declaring a director delinquent in terms of the Companies Act of 2008.

(g) Liability of directors

The Georgia Code of 2017 provides for liability of directors for unlawful distributions only and is therefore not discussed further. The South African Companies Act of 2008 provides for general liability of directors for, amongst others, the breach of their fiduciary duties.[130]

(h) Financial institutions in the State of Georgia

Title 7 of the Georgia Code of 2017 governs financial and banking institutions.[131] Title 7-1-490 provides that "directors and officers of a bank or trust company shall discharge the duties of their respective positions in good faith and with the degree of diligence, care, and skill which an ordinarily prudent person would exercise under similar circumstances."[132] The provisions of this title were also changed when House Bill 192 was signed into law; it now also provides for the business judgment rule in respect of the decisions of directors of banks as provided for in § 14-2-830.[133]

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[130] Georgia Code of 2017 §14-2-832. See s 77 of the Companies Act of 2008; and Chapter 4 para 4.2.8 above for a discussion of the liability of directors in terms of the South African Companies Act of 2008.

[131] This is similar to the regulation by the Banks Act of 1990 under South African law. See Chapter 4, para 4.2 and 4.3 above for a discussion of the Companies Act of 2008 and the Banks Act of 1990. The focus of the discussion of these provisions is on the regulation of directors of banks.

[132] This section also makes similar provisions to the Georgia Code of 2017 § 14-2-830 and will not be repeated.

[133] The South African Banks Act of 1990 does not provide for the business judgment rule. This is discussed in Chapter 4, para 4.3 above.

5.2.3 Corporate Governance

(a) General governance framework

The USA corporate governance relies less on voluntary codes and the "comply or explain" method found in the voluntary corporate governance codes of many jurisdictions, and more on mandatory regulation in the statutes mentioned above.[134] Various other common law jurisdictions like South Africa, the United Kingdom and Canada have opted for a more lenient approach in the form of enabling or partially enabling governance codes of practice, rather than mandatory legislation.[135] This results in companies in these jurisdictions being able to choose the governance practices they want to adopt from a list of best practices, but they must disclose their choices and the resulting governance structures.[136] The USA regulatory regime is based more on hard law and a regulatory state and relies on a "one size fits all" approach,[137] which is opposite to the governance practices in South Africa.[138] In South Africa, "soft law"[139] and

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[134] For a comprehensive discussion of corporate governance in the USA in general see Jackson G *Understanding Corporate Governance in the United States: An Historical and Theoretical Reassessment* (2010) *Hans Bockler Stiftung* http://www.boeckler.de/pdf/p_arbp_223.pdf (Date of use: 28 August 2018); Lessambo *The International Corporate Governance System: Audit Roles and Board Oversight* 46 – 61. Other jurisdictions that uses the "comply or explain" method is the United Kingdom, the Netherlands, and Germany. *King IV* have moved to the "apply and explain" method, see Chapter 4, para 4.4.3 above for a discussion on *King IV*.

[135] "Voluntary" or "enabling" refers to the company's choice to adopt corporate governance practices or standards in the absence of mandatory legislation. Mandatory means legally mandated where penalties will apply to those who fail to comply with the legislation. Three major common law jurisdictions outside the USA, namely, Canada, the United Kingdom and Australia, have partially enabling regimes where a code of best practice is coupled with a mandatory disclosure obligation. See in general, Anand 2006 *Delaware Journal of Corporate Law* 229; Zadkovich J "Mandatory Requirements, Voluntary Rules and 'Please Explain': A Corporate Governance Quagmire" 2007 *Deakin Law Review* 23 – 28; Institute of Directors *The Handbook of International Corporate Governance: A Definitive Guide* (Kogan Page 2005) 180 – 192; Cardale M *A Practical Guide to Corporate Governance* 5th ed (Sweet & Maxwell 2014) 33 – 40.

[136] Anand 2006 *Delaware Journal of Corporate Law* 229 - 230.

[137] Anand 2006 *Delaware Journal of Corporate Law* 229.

[138] For instance, in South Africa, the voluntary *King IV* code is the applicable corporate governance code, and in England, the *UK Combined Code*, while the USA has a rule-

self-regulatory mechanisms like codes are primarily relied on.[140] There have been several corporate failures in the USA.[141] These failures resulted in a significant re-examination of corporate governance in that jurisdiction. There were various legislative changes in the form of the Public Company Accounting Reform and Investor Protection Act of 2002, also known as the Sarbanes-Oxley Act of 2002 (SOX) and the Dodd-Frank Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) as well as regulatory change in the form of new governance guidelines[142] by the New York Stock Exchange (NYSE),[143] and the National Association of Securities Dealers

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based approach, which includes mandatory compliance with legislation and stock exchange requirements. The emphasis is on regulatory enforcement rather than voluntary compliance. See Broshko EB and Li K "Corporate Governance Requirements in Canada and the United States: A Legal and Empirical Comparison of the Principles-based and Rules-based Approaches" (2006) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=892708 (Date of use: 28 August 2018).

[139] This refers to rules that are non-binding or emerging norms, which may or may not eventually lead to binding law. It is not yet grounded in a recognised formal source of law. See in general Naicker M *The Use of Soft Law in the International Legal System of in the Context of Global Governance* (Published LLM thesis University of Pretoria 2013) 2 – 46; Shaffer GC and Pollack M "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance" 2010 *Minnesota Law Review* 707 – 799; Shelton D "Soft Law" 2008 *The George Washington University Law School* 1 – 30.

[140] See Chapter 4, para 4.4 above for a discussion of corporate governance in South Africa.

[141] Solomon J *Corporate Governance and Accountability* (Wiley 2013) 28. In the USA some of these corporate failures were Enron, WorldCom, Adelphia Communications and Tyco. These corporate failures resulted in the USA enacting various statutes to improve corporate governance compliance.For more on the Enron collapse, see in general Aronson NH "Preventing Future Enrons: Implementing the Sarbanes-Oxley Act of 2002" 2002 *Stanford Journal of Law, Business & Finance* 127 – 128; Coglianese C "Legitimacy and Corporate Governance" 2007 *Delaware Journal of Corporate Governance* 162; Millon D "Who 'Caused' the Enron Debacle?" 2003 *Washington & Lee Law Review* 310 -311.

[142] For the NYSE's corporate governance guide, see https://www.nyse.com/publicdocs/nyse/listing/NYSE_Corporate_Governance_Guide.pdf (Date of use: 28 August 2018).

[143] Doherty DP *et al.* "The Enforcement role of the New York Stock Exchange" 1991 (85) *Northwestern University Law Review* 637 – 651; Cochrane JL *et al.* "The Structure and Regulation of the New York Stock Exchange" 1992 *The Journal of Corporation Law* 57 – 77; Dine J and Koutsias M *The Nature of Corporate Governance: The significance of National Cultural Identity* (Edward Elgar Publishing Limited 2013) 141.

Automated Quotation (NASDAQ).[144] One of the biggest failures to date in the USA was Enron.[145] This company was perceived to be highly successful until its sudden filing for bankruptcy. After its collapse, the questions arose why various key role players in Enron like the board of directors and gatekeepers like the auditors, securities analysts and rating agencies missed the red flags relating to the high levels of dishonesty, fraud and corruption that were subsequently uncovered.[146] The lack of independence of both the board of directors and auditors of Enron is relevant to this study, especially in the context of the recent collapse of Steinhoff in South Africa.[147] Following the Enron collapse, various initiatives aimed at the

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[144] Cardale *A Practical Guide to Corporate Governance* 185; and Yeoh P "The Sarbanes-Oxley Act 2002: Time for some Tinkering?" 2007 *Bus Law Rev* 90 – 93. For more in the NYSE and NASDAQ, see Institute of Directors *The Handbook of International Corporate Governance* 185; Heppell JL "Listing on NASDAQ – The Nuts and Bolts" 1998 (56) *The Advocate* 853 – 863.

[145] Enron filed for chapter 11 bankruptcy on 2 December 2001. Shortly after the Enron scandal, the WorldCom scandal broke when on 25 June 2002 it was confirmed that WorldCom had overstated earnings during 2001 and 2002. It subsequently filed for bankruptcy on 21 July 2002. In the months that followed, evidence of poor corporate governance, weaknesses and fraudulent activities emerged, and several class action lawsuits were filed against Enron. One of the main accusations related to fraud and material misstatement in the company's financial statements. It seems that there was little or no transparency in the company and management knew much more than they were letting on. See in general Pillay S "Forcing Canada's Hand? The Effect of the Sarbanes-Oxley Act on Canadian Corporate Governance Reform" (2003 – 2004) *Manitoba Law Journal* 288 – 290; Nemeroff MN "Dodd-Frank: Frankly an Inefficient Form of Corporate Governance" 2012 *University of Florida Journal of Law and Public Policy* 433 – 436; Armour J and McCahery JA *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US* (Hart Publishing 2006) 135; Skeel Jr D *et al.* "Inside-Out Corporate Governance" (2011) *JCL* 149; Miller *The Law of Governance, Risk Management and Compliance* 513 – 517 regarding Enron; Harris AB "Corporate Governance after Enron" 2002 *Taxation of Financial Products* 13 – 19.

[146] Milton 2003 *Washington & Lee Law Review* 311; Coffee JC "Understanding Enron: It's about the Gatekeepers, Stupid" 2002 *The Business Lawyer* 1403 – 1409; Ali PU and Gregoriou GN (eds) *International Corporate Governance After Sarbanes-Oxley* (John Wiley & Sons 2006) 20 – 23.

[147] According to the Enron Special Investigation Committee, the board of Enron was ineffective and the independence of virtually every director on the board was compromised in one way or another. This includes the members of the audit committee. See Gordon JN "What Enron means for the management and control of the modern business corporation: Some initial reflections" 2002 *The University of Chicago Law Review* 1241 – 1242. It is not the intention of this research to go into the detail of the Enron corporate failure, but rather the corporate governance changes which were implemented after the collapse. See Chapter 4, para 4.4.2 above for a discussion of the Steinhoff collapse.

improvement of corporate governance in the USA were put in place.[148] These examples provide a valuable illustration of the critical role of boards and board committees in the management of a company. Although companies were subject to legislation and corporate governance practices, the company collapses indicate a total disregard of existing legislation and regulation. It also confirms the need for rigorous accountability practices. In the USA, the Enron collapse led to the promulgation of further legislation like SOX to try and prevent a similar collapse. The USA corporate governance system is primarily based on the laws of incorporation enacted in each of the states.[149] Securities regulation plays an integral part in the USA, governing its securities industry for public companies. The SEC is the primary securities markets regulator in the USA. It plays a crucial role in protecting public shareholders through enforcement of federal securities laws.[150] The Securities Exchange Act of 1934 provided the SEC with the

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[148] This includes the creation of the Corporate Fraud Task Force and the Enron Task Force within the Justice Department, amendments to the USA Sentencing Guidelines, revisions to the Justice Department's Corporate Prosecution Guidelines, publication of the USA Securities Exchange Commission (SEC) enforcement criteria as well as significant increases in SEC funding, and the establishment of Public Accounting Oversight Board and Auditor Independence. On these initiatives, see Brickley KF "Enron's Legacy" 2004 *Buffalo Criminal Law Review* 230 – 45; on the Public Company Accounting Oversight Board and Auditor Independence, see Ali and Gregoriou (eds) *International Corporate Governance After Sarbanes-Oxley* 11 – 12.

[149] Internal corporate governance includes the board of directors, shareholders' rights and committees; while external corporate governance relates to federal law, gatekeepers, the SEC and other public institutions, the stock markets, and the market for corporate control. See in general, Institute of Directors *The Handbook of International Corporate Governance: A Definitive Guide* 180; V Letsou P "The Challenging Face of Corporate Governance Regulation in the United States: The Evolving Roles of the Federal and State Governments" 2009 *Willamette Law Review* 150 – 167; See in general Pinto AR "An Overview of United States Corporate Governance in Publically Traded Corporations" 2010 *The American Journal of Comparative Law* 264 – 279; Institute of Directors *The Handbook of International Corporate Governance: A Definitive Guide* 179 – 192; Polson L "Development of Corporate Governance in the context of 'Full Disclosure' in the United States" 2002 *Mexican Law Journal* 135 – 141.

[150] The SEC was founded during 1934 after the passing of the Securities Exchange Act of 1934. The principal Acts defining the SEC's mandate and legal framework are the Securities Act of 1933, the Securities Exchange Act of 1934 and SOX. See in general, Du Plessis (eds) *et al. Principles of Contemporary Corporate Governance* 358; Hanna J and Turlington E "The Securities Act of 1933" 1933 – 1934 *Illinois Law Review* 482 – 507; Institute of Directors *The Handbook of International Corporate Governance: A Definitive Guide* 2005 184; Doty JR "The Role of the Securities Commission and Exchange Commission in an Internationalized Marketplace" 1992 *Fordham Law Review*

power to oversee and regulate the financial markets as well as considerable powers to investigate any contravention of legislation, enabling it to bring civil actions to enforce the securities laws and recommend criminal actions to federal prosecutors.[151] The SEC requires public companies to disclose important financial and other related information to the public.[152] However, the powers provided by the Securities Exchange Act of 1934 to the SEC were not sufficient to prevent abuses of power and subsequent corporate failures.

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s71; Calder A *Corporate Governance: A Practical Guide to the Legal Frameworks and International Codes of Practice* (Kogan Page 2008) 16; Pinto 2010 *The American Journal of Comparative law* 275. The mission of the SEC is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. The SEC strives to promote a market environment that is worthy of the public's trust. The SEC also has a strong enforcement capacity, which may result in administrative or litigation proceedings against companies that are non-compliant with the securities legislation. For more on SEC enforcement, see https://www.sec.gov/about.shtml and https://www.sec.gov/litigation.shtml (Date of use: 28 August 2018); Kennedy WM "Securities and Exchange Commission" 1939 *Commercial Law Journal* 383 – 390; V Letsou 2009 *Willamette Law Review* 149 – 199.

[151] Some of the important sections of this Securities Exchange Act are: Section 4 establishes the Securities Exchange Commission, while s 4E relates to enforcement investigations; s 6 relates to national securities exchanges, while s 6(3) contains the listing standards and conditions for training see SEC website for a listing of all the applicable legislation; s 9 contains the prohibition against manipulation of security prices; s 10A contains the audit requirements; s 10A(j) makes auditor rotation mandatory; s 10(A)(m) contains the standards of audit committees; s 12 contains the registration requirement for securities; s 13A relates to reporting and record keeping; s 14B relates to corporate governance; s 15E(t) pertains to the board of directors, independence and management of conflict of interests and s 18 contains the liability for misleading statements made; https://www.sec.gov/answers/about-lawsshtml.html (Date of use: 8 August 2018). See in general Smerdon R *A Practical Guide to Corporate Governance* 4th ed (Sweet & Maxwell 2010) 616 – 628; Tracy JE and MacChesny AB "The Securities Exchange Act of 1934" 1934 (32) *Michigan Law Review* 1025 – 1068; Hanna J "The Securities Exchange Act of 1934" 1934(xxiii) *California Law Review* 1 – 29; Pinto 2010 *The American Journal of Comparative law* 275.

[152] The SEC has the power to impose both criminal and civil sanctions to enforce the law. See in general, Institute of Directors *The Handbook of International Corporate Governance: A Definitive Guide* 2005 184; Busbee D "Corporate Governance: A Perspective 2003 *Law and Business Review of the Americas* 6; Jennings RW "Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission" 1964 *Law and Contemporary Problems* 663 – 690. Section 21 of the Securities Exchange Act relates to investigations, injunctions and prosecution of offences; and s 32 contains the penalties for non-compliance. See in general, the SEC's enforcement website https://www.sec.gov/litigation.shtml (Date of use: 10 August 2018); Brickey 2004 *Buffalo Criminal Law Review* 240 – 254; Mark G "SEC Enforcement Discretion" 2016 *Texas Law Review* 261 – 278.

Following the corporate failure of Enron, the Sarbanes-Oxley Act of 2002 was promulgated.[153] This Act had a profound impact on corporate governance in the USA. Public companies in the USA bear the brunt of the various corporate governance changes that followed the Enron corporate failure. Private companies do not sell shares to the public, they do not list on any stock exchange, and they are not subject to SOX. However, this does not mean that private companies do not have to comply with the principles of good corporate governance. They must adhere to the corporate governance principles contained in their state corporation laws.[154] SOX came into force in 2002 and introduced significant changes to the regulation of financial practice and corporate governance as well as securities law.[155] SOX applies to all issuers, including foreign private

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[153] The Public Company Accounting Reform and Investor Protection Act of 2002 is generally referred to as "SOX." Du Plessis (eds) *et al. Principles of Contemporary Corporate Governance* 358; Bainbridge *The New Corporate Governance: In Theory and Practice*176. SOX is dealt with in more detail below in subsection (b).

[154] Institute of Directors *The Handbook of International Corporate Governance: A Definitive Guide* 2005 184.

[155] It was named after senator Paul Sarbanes and Representative Michael Oxley who were the main architects of the Act. See in general Bainbridge *Corporate Governance after the Financial Crisis* 5 – 9; Hanson GR "Recent Developments affecting the liability of Professionals, Officers and Directors" 2004(39) *Tort Trial & Insurance Practice Law Journal* 688. Although SOX relates more to accounting, and is not applicable to higher education institutions, it constitutes important federal legislation in the USA relating to corporate governance of public companies. See in general Smerdon *A Practical Guide to Corporate Governance* 628 – 642; Kieff FS and Paredes TA *Perspectives on Corporate Governance* (Cambridge 2010) 420 – 428; Kimb B "Sarbanes-Oxley Act" 2003(40) *Harvard Journal on Legislation* 235 – 252; Wiley RA "Sarbanes-Oxley Act" 2006(50) *Boston Bar Journal* 10 – 13; see Du Plessis (eds) *et al. Principles of Contemporary Corporate Governance* 358 – 362 for a discussion of some of the provisions of SOX. The six main objectives of SOX are the following: establishing the Public Company Accounting Oversight Board; enhancing the independence of public company auditors; regulating corporate governance and responsibility; enhancing financial disclosure; regulating securities analyst conflicts of interest; and adding several new substantive crimes under the securities laws as well as enhancing penalties for violations of securities and other laws. SOX focuses more extensively on the accounting industry and on the responsibility of top corporate executives. Noticeably one of the problems with accounting was the conflict of interest insofar as the auditors of companies usually also provided consulting services in addition to the audits that they undertook. Therefore, there was no incentive for the auditors to undertake a thorough audit in fear that an unhappy client taking his/her consulting business elsewhere. See in general Pillay 2003 – 2004 *Manitoba Law Journal* 285 – 286 and 290 – 297; Johnson LPQ and Sides MA "The Sarbanes-Oxley Act and Fiduciary Duties" 2004 *William Mitchell Law Review* 1154.

issuers,[156] who have registered securities under the Securities Exchange Act of 1934, are required to file reports under section 15(d) of the Securities Exchange Act of 1934 or have filed a registration statement under the United States Securities Act of 1933.[157] These failures were considered to be the result of inadequate existing legislation. SOX introduced significant changes relating to corporate governance for companies listed on stock markets pertaining to accounting, auditing and reporting.[158] SOX expressly prohibits certain actions and attaches heavy administrative, civil and criminal penalties and sanctions to companies for non-compliance.[159] It applies to companies, including any non-US company that is required to file reports with SEC, since it is listed with the NYSE or the NASDAQ or has made a registered offering of securities within the USA.[160] SOX mandates changes that affect executive compensation, shareholder monitoring and board monitoring.

Further changes include restrictions on insider trading and enhanced financial disclosures.[161] SOX also indirectly affects private companies. Many

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[156] James R, Brod C and Bibko E "The Application of the United States Sarbanes-Oxley Act to Non-US Issuers" 2003 *Business Law International* 101 – 126; Dine and Koutsias *The Nature of Corporate Governance: The Significance of National Cultural Identity* 141.

[157] Smerdon *A Practical Guide to Corporate Governance* 628; Dine and Koutsias *The Nature of Corporate Governance: The Significance of National Cultural Identity* 140 – 141.

[158] Kamar E, Karaca-Mandic P and Talley E "Going Private Decisions and the Sarbanes-Oxley Act of 2002: a cross country analysis" 2009 (25) *Journal of Law, Economics and Organisation* 1.

[159] Thomson 2008 *Journal Business and Technology Law* 393 – 415; Russel JD "The Sarbanes-Oxley Act of 2002: New Criminal Penalties and Civil Remedies for Corporate Misconduct" 2002(36) *Oklahoma Bar Journal* 3477 – 3490; Lerner CS and Yahya MA "Left Behind" after Sarbanes-Oxley" 2007 *American Criminal Law Review* 1383 - 1416.

[160] Hendrikse and Hefer-Hendrikse *Corporate Governance Handbook* 97; Skeel *et al.* 2011 *JCL* 154 – 159; Falencki CA "Sarbanes-Oxley: Ignoring the Presumption against Extraterritoriality" 2004 *The George Washington International Law Review* 1211 – 1238.

[161] These changes include *inter alia* directions for SEC and national securities exchanges, which include the NYSE and NASDAQ, which must establish standards regulating to audit committees. See Holmstrom and Kaplan "The state of US Corporate Governance: What's right and what's wrong?" 20 – 21

states aligned their corporate laws to SOX. The enhanced compliance standards on state level affected private companies.[162] One of the important creations under SOX was the establishment of the Public Company Accounting Oversight Board (PCAOB), which is responsible for the establishment of enhanced quality control mechanisms to conduct inspections, launch disciplinary proceedings and apply sanctions where necessary.[163] Both the SEC and PCAOB are agencies that hold a considerable amount of power with regard to the regulation and enforcement of financial and accounting standards in the USA.[164] It is clear from the discussion above that public companies are subject to a higher standard of corporate governance. This can be expected, as the failure of a public company will have a greater negative impact on the economy then the failure of a private company.

On 21 July 2010, the Dodd-Frank Act was signed into power.[165] This Act provided for significant changes to federal financial regulation and new

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http://www.nber.org/papers/w9613.pdf (Date of use: 28 August 2018). SOX requires more detailed disclosure of off-balance sheet financings and special purpose entities, which will result in it being more difficult to manipulate financial statements. It also enhances board monitoring which mainly focuses on increasing the power, responsibility and independence of the audit committee. Finally, SOX also increases both the management and the board's responsibility for financial reporting as well as imposing criminal penalties for misreporting. See Johnson and Sides 2004 *William Mitchell Law Review* 1149 -1150.

[162] Dine and Koutsias *The Nature of Corporate Governance: The Significance of National Cultural Identity* 141.

[163] Ali and Gregoriou (eds) *International Corporate Governance After Sarbanes-Oxley* 11; see in general Public Company Accounting Oversight Board https://pcaobus.org/ (Date of use: 10 August 2018); Innes W "The Unaccountability of the Accounting Regulators: Analyzing the Constitutionality of the Public Company Accounting Oversight Board" 2009 *The John Marshall Law Review* 1025 – 1048; Weiss EJ "Some thoughts on an agenda for the Public Company Accounting Oversight Board" 2003 *Duke Law Journal* 491 – 515. Prior to the enactment of SOX, the auditing profession was self-regulated, and it was clear after the various corporate failures that the auditing profession will benefit from being regulated. See in general, Markham JW and Gjyshi R (eds) *Research Handbook on Securities Regulation in the United States* (Edward Elgar Publishing Limited 2014) 287 – 291.

[164] Innes 2009 *The John Marshall Law Review* 1020.

[165] The Dodd-Frank Act was yet another response to the financial crisis that took place in 2008. However, the root cause for these failures is debatable; some blame deregulation while others suggest greed on the part of lenders, borrowers and investors

substantive requirements that apply to a broad range of market participants, including public companies that are not financial institutions.[166] The Act provided for, amongst others, corporate governance and executive compensation reforms and new registration requirements for hedge fund and private equity fund advisors.[167] The aim of the legislation is to "promote the financial stability of the USA, by improving accountability and transparency in the financial system to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices and for other purposes."[168]

Neither SOX nor the Dodd-Frank Act applies to higher education institutions. However, it is essential to provide an overview of these laws/statutes as it provides some context to the "hard law" approach of the United States as well as how the USA dealt with corporate failures like Enron.[169]

In view of the similarities between the recent Steinhoff corporate failure and that of Enron, it is the author's view that South Africa should take a

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caused the crisis. Many others point the fingers to corporate governance failures of major financial institutions. However, the Dodd-Frank does nothing to address the globalisation that creates incentives for excessive debt and impairs employment in the USA, thus rendering future debt crises inevitable. For more on the Dodd-Frank, see in general Ramirez SA "Dodd-Frank as Maginot Line" 2011 *Chapman Law Review* Vol 15 110; Bainbridge *Corporate Governance after the Financial Crisis* 9 – 19; Skeel 2011 *JCL* 150; Enochs CR "Update on the Dodd-Frank Act" 2014 (36) *Houston Journal of International Law* 341 – 378.

[166] Nemeroff 2012 *University of Florida Law Journal of Law and Public Policy* 431 – 432. Dodd-Frank will dramatically reworked three crucial areas: (a) internal corporate decision-making; (b) third-party gatekeepers; and (c) financial derivatives. See Skeel 2011 *JCL* 150.

[167] See a summary of Dodd-Frank Financial Regulation Legislation http://corpgov.law.harvard.edu/2010/07/07/summary-of-dodd-frank-financial-regulation-legislation/ (Date of use: 28 August 2018).

[168] Preamble of the Dodd-Frank Act. See Smith LR and Muniz-Franticelli VM "Strategic Shortcomings of the Dodd-Frank Act 2013 *The Antitrust Bulletin* 619 and 622 – 628 on the strategic difficulties of the Dodd-Frank Act.

[169] It is important to have this overview in lieu of the recent Steinhoff scandal in South Africa, which is very similar to the Enron scandal in the USA.

stronger approach to corporate governance as the softer approach of South Africa does not seem to be effective enough.[170] It is as yet not clear whether the legislative changes in the USA have been effective to change governance practices. It must be reiterated that no legislation will ever change criminal behaviour. Steinhoff was subject to the Companies Act of 2008 and because it was listed on the JSE, the company had to comply with the *King Report on Corporate Governance*. However, Steinhoff was incorporated in the Netherlands and has a two-tier board, namely a management board and a supervisory board. Despite being subject to both South African and international legislation, it is clear from the findings that Steinhoff's supervisory board did not exercise proper oversight of the management board. There was an apparent disregard of good corporate governance practices and a continued failure to take responsibility for the failures. Even after the crisis broke in December 2017, the board authorised exorbitant additional payments to certain executive members of the executive management, although they had formed part of the management team that ignored corporate governance practices and legislation in the first place.[171] Steinhoff is an example of a board of directors that ignored not only legislation, but also the application of applicable corporate governance practices. Although the investigations into the Steinhoff-matter have not yet been concluded, there should be consequences for the management members implicated in any wrongdoing.

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[170] See Chapter 4, para 4.4.1 above for a discussion of Steinhoff.

[171] Steinhoff is incorporated in the Netherlands and has a two-tier board structure, which is common amongst European companies. However, this structure over complicates governance. See Rossouw J and Styan J "Steinhoff collapse: a failure of corporate governance" *International Review of Applied Economics* 2019(33) 165, 167.

(b) The American Law Institute's (ALI) *Principles for Corporate Governance: Recommendations and Analysis*

In this paragraph, the *ALI Principles*[172] and comparable principles of Georgia corporate law are considered.[173] The American Law Institute confirmed that these principles are voluntary.[174] The ALI initiated a project regarding corporate reform in 1978.[175] After several tentative iterations of the *ALI Principles*, they were eventually published in 1994, and are reviewed from time to time.[176] This was a very contentious project due to some fundamental changes proposed to, for example, the structure and composition of the board of directors and derivative suits.[177] The *ALI Principles* do not cover all areas of corporate law, but rather focus on the

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[172] See the American Law Institute (ALI) on https://www.ali.org/ (Date of use: 28 August 2018). The project was entitled "Principles of Corporate Governance: Analysis and Recommendations", hereafter referred to as the *ALI Principles*. The American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* were approved during 31 May 1992. See in general Hansen 1993 *The Business Lawyer* 1355; du Plessis (ed) *et al. Principles of Contemporary Corporate Governance* 355 - 357 for more on the *ALI Principles*, as well as Knowles MF and Flannery C "The *ALI Principles of Corporate Governance* Compared with Georgia Law" 1995 *Mercer Law Review*. For the purposes of this research, the focus is on the duty of care and the business judgment rule. For a full discussion of the other principles, see Knowles and Flannery 1995 *Mercer Law Review*.

[173] The focus remains on directors and officers and their duties and liabilities. The *ALI Principles* are not discussed in detail.

[174] This was confirmed by way of email correspondence with the American Law Institute.

[175] This project grew out of various conferences held during 1977 and 1978, following which the first tentative draft was published in 1982. Mofsky JS and Rubin RD "Introduction: A Symposium on the ALI Corporate Governance Project" 1983 *University of Miami Law Review* 173; Goldstein 1984 *The George Washington Law Review* 503 – 504.

[176] See in general, Knowles and Flannery 1995 (47) *Mercer Law Review* 2; Eisenberg MA "An Overview of the Principles of Corporate Governance" 1993 (48) *The Business Lawyer* 1271 – 1296; Mitchell LE "Private Law, Public Interest?: The ALI Principles of Corporate Governance" 1993 (61) *The George Washington Law Review* 871 – 897.

[177] Cheffins BR (ed) *The History of Modern US Corporate Governance* (Edward Elgar Publishing 2011) 557 – 558; Dooley MP "Two Models of Corporate Governance" 1992 *The Business Lawyer* 461 – 464.

objectives and conduct of the business corporation;[178] the structure of the corporation; the duty of care; the duty of fair dealing;[179] and the role of directors and shareholders. Section 3.01 of the *ALI Principles* establishes that the principal senior executives appointed by the board of directors are responsible for the management of the corporation. One of the basic functions of the board is to select and oversee management. In terms of section 3.02, senior management is subject to the functions and powers of the board.[180] The authority of senior managers as set out in the *ALI Principles* is virtually identical to the position adopted in Georgian case law.[181] Section 3.02 of the *ALI Principles* lists five functions the board of directors *should*[182] perform, and seven functions that it *may*[183] perform.[184] The section also recognises the board's ability to delegate authority to its

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[178] See Seligman J "A Sheep in Wolf's Clothing: The American Law Institute's *Principles of Corporate Governance Project*" 1986 – 1987 *Washington Law Review* 325 – 381 for a critique on these principles.

[179] For more on corporate fiduciaries and s 2.01 of these principles, see Ryan PJ "Strange Bedfellows: Corporate Fiduciaries and the General Law – Compliance in s 2.01(a) of the *American Law Institute's Principles of Corporate Governance*" 1991 (66) *Washington Law Review* 413 – 502.

[180] This is the position of the Georgia Code of 2017 § 14-2-801.

[181] Knowles and Flannery 1995 *Mercer Law Review* 8; *Holliday Construction Company v Sandy Springs Associates* 198 Ga. App 20, 400 S.E.2d 380 (1990); *Cooper v G.E. Construction* 116 Ga. App.690, 158 S.E.2d 305 (1967).

[182] These functions are to select, regularly evaluate, fix the compensation of, and, where appropriate, replace the principal senior executives; oversee the conduct of the corporation's business to evaluate whether the business is being properly managed; review and, where appropriate, approve the corporation's financial objectives and major corporate plans and actions; review and, where appropriate, approve major changes in, and determinations of other major questions of choice respecting the appropriate auditing and accounting principles and practices to be used in the preparation of the corporation's financial statements; and perform such other functions as are prescribed by law or assigned to the board under a standard of the corporation. See generally, Knowles and Flannery 1995 *Mercer Law Review* 9.

[183] These functions are to initiate and adopt corporate plans, commitments and actions; initiate and adopt changes in accounting principles and practices; provide advice and counsel to the principal senior executives; instruct any committee, principal senior executive or other officer.... and review the actions of any committee, principal senior executive or other officer; make recommendations to shareholders; manage the business of the corporations; and act on all other corporate matters not requiring shareholder approval. See generally, Knowles and Flannery 1995 *Mercer Law Review* 9.

[184] Knowles and Flannery 1995 *Mercer Law Review* 9.

committees.[185] The *ALI Principles* require that large publicly held corporations have an audit committee,[186] and suggest that smaller corporations also do so. In addition, all corporations are advised to have a committee responsible for the nominations of directors and large corporations are recommended, also to have a committee responsible for executive remuneration.[187] This is similar to the recommendations of *King IV*, except that the committees recommended by *King IV* would apply to all governing bodies, not only to large corporations.[188] However, the Georgia Code of 2017 does not contain any recommendations for specific committees, which allow companies to choose committees suited to their needs.[189] The position in South Africa is different, as specific committees are prescribed in terms of the Companies Act of 2008 for certain types of companies. Companies may also constitute other committees to assist it.[190]

Section 4.01 of part IV provides for the duty of care[191] as well as the business judgment rule.[192] The *ALI Principles* do not impose a higher

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[185] The Georgia Code of 2017 provides for committees in §14-2-825, yet it does not prescribe specific committees.

[186] The *ALI Principles* state that the audit committee should at least consist of three directors, the majority of whom have no significant relationship with the corporation's senior executives. In addition, the members may not currently be employed by the corporation or have been employed by the corporation within the previous two years. The purpose of this committee is to implement and support the board's oversight function. See Knowles and Flannery 1995 *Mercer Law Review* 14 and s 3.05 of the *ALI Principles.* For the duties of the audit committee, see s 3A.03 of the *ALI Principles.*

[187] See s 3.04(a) and s 3.05 of the *ALI Principles;* Knowles and Flannery 1995 *Mercer Law Review* 15; 14.

[188] *King IV* is discussed in Chapter 4, para 4.4.3 above. The required committees in terms of the *2014 Reporting Regulations* is discussed in Chapter 4, para 4.4.4 above.

[189] See the Georgia Code of 2017 title 14-2-825.

[190] Yet, the Act does not prohibit the establishment of any other committees.

[191] It states the following: "…a director or officer has a duty to the corporation to perform the director's or officer's functions in good faith, in a manner that he or she reasonably believes to be in the best interests of the corporation and with the care that an ordinarily prudent person would reasonable be expected to exercise in a like position and under similar circumstances". See Knowles and Flannery 1995 *Mercer Law Review* 16 – 18. See para 5.2.3 (d) below for a discussion of director's duties. See para 5.2.3 (e) above for the discussion of the director's standard of conduct in terms of the Georgia Code of 2017.

degree of care on the directors of banks and other financial institutions than that which is required for the directors of other business corporations. The Georgia Code of 2017 has now codified the business judgment rule in the Banking Code of Georgia.[193] In South Africa, a higher degree of care is expected of directors of banks and financial institutions.[194] Section 4.01(b) of the *ALI Principles* reiterates the board's authority to delegate any function of the board provided the delegation to comply with sections 4.02[195] and 4.03[196] of the *ALI Principles*. The Georgia Code of 2017 has similar provisions.[197] This is also similar to the provisions of section 72 of the Companies Act of 2008 in South Africa that provides for the delegation of powers from the board to committees.

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[192] See Knowles and Flannery 1995 *Mercer Law Review* 18 – 20. See also para 5.4 below for a discussion of the codification of the business judgment rule in the Georgia Code of 2017.

[193] See para 5.4 below for a discussion of the codification of the business judgment rule in the Georgia Code of 2017.

[194] See Chapter 4, para 4.3 above for a discussion of the directors of banks in South Africa.

[195] In accordance with this section, the *ALI Principles* elaborate on the ability of directors and officers to rely on information obtained from directors, officers, corporate employees, experts and other persons who are believed to merit confidence.

[196] In accordance with this section, the *ALI Principles* expand on the authorisation given in s 4.01(b) for a director to rely on information obtained from a committee of the board.

[197] Title 14-2-830 (b) of the Georgia Code of 2017; see Knowles and Flannery 1995 *Mercer Law Review* 19.

5.3 THE LEGAL SYSTEM OF CORPORATE LAW AND CORPORATE GOVERNANCE IN CANADA

5.3.1 Introduction

The Dominion of Canada was created under the auspices of the British North America Act of 1867 (BNA Act).[198] The Canadian Constitution includes the Constitution Act of 1867,[199] the Constitution Act of 1982, various other statutory enactments and orders of the council as well as other documents, which are sometimes referred to as the unwritten constitution or the common law constitution.[200] The Constitution Act of 1867 details the power and jurisdictions of the government as well as establishing Parliament, the provincial legislatures and the Canadian court system.

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[198] The BNA Act establishes the rules of federalism, which are essentially the rules that allocate the governmental power between the federal parliament and the provincial legislatures. The Constitution Act of 1867 and the Constitution Act of 1982 are statutes enacted for Canada by the United Kingdom Parliament in its role as imperial Parliament. See in general, Gall *The Canadian Legal System* 57; Hogg PW *Constitutional Law of Canada* (Thomson Creswell 2007) 1-12.2 - 1-13, 1-3. – 1-6; Bourinot JB "Federal Constitution of Canada" 1890 (2) *Judicial Review* 131 – 14; Monahan PJ and Shaw B *Constitutional Law* 4th ed (Irwin Law 2013) 4 – 6.

[199] This was originally the BNA Act, but was renamed the Constitution Act of 1867; see Regimbald G and Newman D *The Law of the Canadian Constitution* (LexisNexis 2013) 5 – 6.

[200] The Constitution Act of 1982 made some important changes to the Constitution. The leading instrument was the Canada Act of 1982, a short statute of the United Kingdom Parliament, which terminated the authority of the United Kingdom over Canada. Schedule B of the Canada Act of 1982 contains the Charter of Rights. The Constitution Act of 1982 provided for the following: the change of the name of the BNA Act to the Constitution Act of 1867 and the provision of a definition of the phrase "Constitution of Canada." The Constitution of Canada is defined in s 52(2) of the Constitution Act of 1982. See in general Gall *The Canadian Legal System* 57; Hogg *Constitutional Law of Canada* 1-6 – 1-12.2; *New Brunswick Broadcasting Co v Nova Scotia* (1993) where the Supreme Court of Canada held that the definition as provided in s 52(2) is not exhaustive. The Court furthermore held that the unwritten doctrine of parliamentary privilege should be included in the definition, although s 52(2) makes no mention of parliamentary privilege. See Gall *The Canadian Legal System* 57. For more on the constitutional development of Canada, see in general Monahan and Shaw *Constitutional Law* 31 – 52. See in general Rothman LI, Elman BP and Gall GL *Constitutional Law: Cases, Commentary and Principles* (Thomson West 2008) 1.

Canada, like South Africa, was once a British colony.[201] The Constitution Act of 1867 divides the authority for the judicial system between the federal government and the provincial governments. [202] In 1931, Canada officially ceased to be a British Colony, and the British Parliament lost most of its power to pass laws in the country.[203] The common law, much like in South Africa and the USA, applies in Canada.[204] Canada has independent national and regional governments, each operating in its own jurisdiction.[205] In

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[201] During the 18th and 19th century, Canada as we know it today did not exist. Canada started changing during the mid-1800s when the Canadian legislature was established, and the country started enacting its own legislation. See Gall *The Canadian Legal System* 51 – 61; for more on the Canadian Constitution see http://www.justice.gc.ca/eng/csj-sjc/just/05.html (Date of use: 28 August 2018).

[202] The provincial governments are Ontario, Quebec, British Columbia, Alberta, Nova Scotia, Manitoba, Newfoundland, Prince Edward Island, Saskatchewan and New Brunswick. See in general, Teeple D "The History and Role of the Supreme Court of Canada" (2002) *Australian Law Library* 218; Rothman, Elman and Gall *Constitutional Law: Cases, Commentary and Principles* 247 – 253.

[203] It was not until 1949 that Britain ceased to be the ultimate authority in Canadian law. Until that year, legal cases from Canadian courts could be appealed to the Judicial Committee of the British House of Lords, which acted as a Supreme Court. In 1949, the right of appeal to Britain was abolished, making the Supreme Court of Canada the new highest legal body in the country. Canadian law was then finally sovereign. For more on the Statute of Westminster, see Gall *The Canadian Legal System* 57; Hogg *Constitutional Law of Canada* 3-4 – 3-7; Regimbald and Newman *The Law of the Canadian Constitution* 6.

[204] For more information, on the Canadian legal system see http://www.thecanadaguide.com/legal-system (Date of use: 28 August 2018 In terms of the Constitution Act of 1982, there are eleven sovereign legislative bodies in Canada, one being the Parliament of Canada, and the others the ten provincial legislatures. The Canada Act of 1982, its Schedule B, and the Constitution Act of 1982 were enacted by the United Kingdom Parliament on 29 March 1982 when they received royal assent. The Canada Act of 1982 came into force immediately. See in general Gall *The Canadian Legal System* 57; Hogg *Constitutional Law of Canada* 3-9; for more on the Parliament of Canada, see http://www.parl.gc.ca/default.aspx?Language=E (Date of use: 28 August 2018). Though Canada is a federation with power shared between the local and national levels of government, the Canadian justice system is said to be unitary, meaning federal and provincial courts are not independent from one another, but rather operate within a single system.

[205] The Canadian federal government is different to that of the USA since the BNA Act provides the provinces with only enumerated powers to make laws and the residuary power to the federal Parliament. In the USA, residuary power is left to the states. In terms of s 91(2) of the Canadian Constitution, the Canadian Federal Parliament was given the power to regulate trade and commerce while the USA Congress only has limited power to regulate commerce with foreign nations, and among the several states and with Indian tribes. In terms of the Canadian Constitution banking, marriage, divorce and criminal law were left in the hands of the Canadian Federal Parliament while in the USA it was left to the states. See Hogg *Constitutional Law of Canada* (Carswell 2015 Student Edition) 5-15 – 5-16. Furthermore, Canada has a bicameral

Canada, there are three levels of government.[206] Section 93 of the Constitution Act specifically gives the provincial legislature the exclusive power to make laws in relation to education. The provinces, therefore, have the direct responsibility to develop and regulate legislation pertaining to higher education as well as to provide support to institutions.[207] The Crown is synonymous with the government, and its powers are derived from statutory as well as common law. Statutory powers are created by an Act of Parliament.[208] The Cabinet is the centre of the federal government and is

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legislature comprising the House of Commons and the Senate. See Richard JD "Federalism in Canada" 2005 – 2006 (44) *Duquesne Law Review* 6.

[206] Firstly, the federal level, which deals with matters as described in the Constitution Act generally, affects the whole country. Secondly, there are the provincial governments, which provide each province the power to deal with matters as described in the Constitution Act, such as education, health care, some natural resources and road regulations. Sometimes the federal and provincial governments share responsibility. Thirdly, there is the municipal level of government. This is the level that is usually based in a city, town or district (a municipality). Municipal governments are responsible for areas such as libraries, parks, community water systems, local police, roadways and parking. They receive authority for these areas from the provincial governments. For more information on the different levels of government see, http://www.lop.parl.gc.ca/About/Parliament/Education/ourcountryourparliament/html_booklet/three-levels-government-e.html (Date of use: 28 August 2018).

[207] Canada is a hereditary monarchy with the monarch inheriting the office of head of state. At present, Queen Elizabeth II is Canada's official head of state, although all her powers and responsibilities have been transferred to the Governor General, who is the Queen's representative. The Queen plays no active role in the day-to-day management of the country. The Prime Minister of Canada is the parliamentary leader of the political party that has a majority of seats in the House of Commons. See in general, Shanahan and Jones 2007 *Higher Education Research and Development* 32; Hogg *Constitutional Law of Canada* 9-9 – 9-10. The Governor General has the same constitutional role in Canada as the queen has in England. The governor general has extensive legal powers in terms of the Canadian Constitution, which are derived from both the common law and statutes. The USA, on the other hand, is a republic with an elected president, more like South Africa. See Monahan and Shaw *Constitutional Law* 12. For more on the queen and the governor general see Monahan and Shaw *Constitutional Law* 56- 64; Hogg *Constitutional Law of Canada* 9-2.

[208] These powers include the right to appoint senators, superior court judges and the lieutenant governors of the provinces as well as the power to summon and dissolve the House of Commons, the exclusive right to recommend money bills and the right to assent to legislation. The Canadian Constitution does not specifically mention the position of the Prime Minister, and the position is a creature of convention. The main functions of the Prime Minister are to form a government and to choose and preside over the Cabinet. The power to enact laws is vested in the Parliament of Canada, which consists of the Senate, the elected House of Commons and the Queen. A bill must be approved by both the House of Commons and the Senate and be signed by the Queen or the Governor General. The provinces are responsible for laws in relation to areas of provincial jurisdiction and may be enacted by the elected Legislative Assembly of the

led by the Prime Minister. The Cabinet directs the federal government by determining priorities and policies and ensuring their implementation. Ontario has a unicameral parliament.

Part V of the Constitution Act provides for the establishment of the provincial constitutions. The provincial government of Ontario is led by the Premier. Sections 69 and 70 of the Constitution Act provide for the legislative power in Ontario and confirm that there is a Legislative Assembly in Ontario. The government of Ontario has 28 Ministries, one of them being the Ministry of Training, Colleges and Universities.[209]

5.3.2 Corporate law in Ontario (Canada)

As is the case in South Africa, Canadian company law is based on the English Joint Stock Companies Act, which came into force in 1844.[210] Corporate law in Canada is based on four principles, namely, corporate responsibility, managerial power, majority rule and minority protection.[211] Business corporations are incorporated either federally[212] or provincially.[213]

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province and approved by the lieutenant governor. See in general Monahan and Shaw *Constitutional Law* 58 – 61, 64 – 66, 83, 87, 91 – 94.

[209] This Ministry is enacted by the Ministry of Training, Colleges and Universities Act R.S.O. 1990 c. M. 19. For more information on this Ministry, see https://www.ontario.ca/page/ministry-training-colleges-universities (Date of use: 28 August 2018). See para 5.5.2(b) below for a discussion of this Ministry.

[210] Vict. Cc. 110 & 111 1855. For more on the history of corporations see Welling B *Corporate Law in Canada: The Governing Principles* 3rd ed (Scribblers Publishing 2006) 46 – 57.

[211] Welling B *Corporate Law in Canada: The Governing Principles* 3 rd ed (Scribblers Publishing) 58. For a discussion of the evolution of Canadian Corporate Law see McGuiness KP *The Law and Practice of Canadian Business Corporations* (Butterworths 1999) lxxiv – lxxvii.

[212] Canada Business Corporations Act (CBCA). The advantages of federal incorporation are (a) the right to carry on business in any province in Canada, as long as the corporation complies with provincial legislation; and (b) the right to carry on business in any province under its own name even though a provincially incorporated corporation with the same or similar name may exist. See Day M and Aron B *Ontario Corporate Procedures* 4th ed (Carswell 2001) 34. Financial institutions typically incorporate under federal legislation; like the Bank Act SC 1991 C 46; Emes AS "Corporate Governance and Directors Duties 2011" Torys LLP

In Canada, there are eleven corporate law jurisdictions. For the purposes of this research, the focus is on Ontario due to the fact that its public universities are corporations. In 1975, the CBCA[214] was implemented by the federal government of Canada, based on the recommendations of the Dickerson Committee.[215] Most corporate statutes in Canada followed the CBCA. In 1982, Ontario enacted the OBCA, which is similar to the CBCA.[216] Section 92(11) of the Constitution Act provides the provinces with the power to incorporate corporations.[217] Corporations incorporated in a province are limited to conducting their business within that one province, whereas a corporation that is federally incorporated has the right to operate throughout Canada.[218] As is indicated above, the primary source of federal

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http://www.torys.com/Publications/Documents/Publication%20PDFs/AR2011-21.pdf (Date of use: 28 August 2018).

[213] In Ontario, it is the OBCA or the Ontario Corporations Act.

[214] Section 4 of the Act states that the purposes of the Act are to revise and reform the law applicable to business corporations incorporated to carry on business throughout Canada, to advance the cause of uniformity of business corporation law in Canada and to provide a means of allowing an orderly transference of certain federal companies incorporated under various Acts of Parliament to this Act. The CBCA is the product of Dickerson, Howard; Leon and Gets, authors of the Federal Proposals for a New Business Corporations Law for Canada. A draft statute in 1971 culminated in the CBCA. See further Gray W *Canada Business Corporations Act* (Carswell 1998); Steward LaRue L "Significant Reform of the Canada Business Corporations Act" 2004 (10) *Law and Business Review of the Americas* 215 – 217.

[215] Dickerson RVW, Howard JL and Gets L *Proposals for* a *New Business Corporations Law for Canada* (Ottawa 1971). See also Sutherland H *et al. Fraser & Stewart: Company Law of Canada* 6th ed (Carswell 1993) 4. The CBCA replaced the Canada Corporations Act of 1964 – 1965, which in return revised the former Companies Act of 1934. This in return was a revision of the 1902 Act whose predecessors were the Canada Joint Stock Companies Act of 1877 and the Canada Joint Stock Companies Letters Patent Act of 1869.

[216] The OBCA replaced the Companies Acts of 1907 in 1942, which in turn replaced the Ontario Companies Act of 1897 and the Ontario Joint Stock Companies Letters Patent Act of 1874. See Sutherland *et al. Fraser & Stewart: Company Law of Canada* 4. See Welling *Corporate Law in Canada: The Governing Principles* 44. Both the CBCA as well as the OBCA are discussed more fully below in para 5.3.3.

[217] Nicholls CC *Corporate Law* (Emond Montgomery Publications Limited 2005) 15; Welling *Corporate Law in Canada: The Governing Principles* 1 – 3; Van Duzer *The Law of Partnerships & Corporations* 99; Welling *Corporate Law in Canada: The Governing Principles* 2.

[218] This territorial limitation emanates from the Constitution Act of 1867 in ss 92, 92 and 95. See in general Welling *Corporate Law in Canada: The Governing Principles* 7; Gillen M *et al. Corporations and Partnerships: Canada* (Kluwer law 1994) 12;

corporate law in Canada is the CBCA.[219] In terms of section 3(4) of the CBCA, there are limitations on certain corporations to carry on businesses. No corporation shall carry on the business of a bank; an association to which the Cooperative Credit Associations Act of 1991[220] applies; a company or society to which the Insurance Companies Act applies; or a company to which the Trust and Loan Companies Act of 1991[221] applies. Section 3(5) of the Act specifically states that "…..[n]o corporation shall carry on business as a degree-granting educational institution unless expressly authorised to do so by a federal or provincial agent that by law has the power to confer degree-granting authority on an educational institution".

The CBCA applies to all corporations and body corporates that were enacted in terms of this Act[222] while the Canada Not-For-Profit Corporations Act of 2009 (CNCA)[223] applies to every federal corporation, and to the

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Sutherland H, Horsley DB and Edmiston JM *Fraser's Handbook on Canadian Company Law* 7th ed (Carswell 1985) 3. See the matter of *Bonanza Greek Gold Mining Co Ltd v The King* (1916) 1 AC 566 (Ont JCPC) where a mining company incorporated in Ontario arranged contracts with the Federal Crown relating to mining operations in Yukon Territory. This corporation sued on the contracts, but the Crown denied liability based on the fact that the corporations' mining activities in Yukon fell outside its authorized activities in terms of the territorial limitation.

[219] According to s 3 of the CBCA, the Act applies to a body corporate that continues as a corporation under this Act. A body corporate includes a company or other body corporate wherever or however incorporated. Section 4 states the purpose of the Act as follows, "…to revise and reform the law applicable to business corporations incorporated to carry on business throughout Canada to advance the cause of uniformity of business corporation law in Canada; and to provide a means of allowing an orderly transference of certain federal companies incorporated under various Acts of Parliament to this Act". A corporation means a body corporate incorporated or continued under this Act, and not discontinued under the Act. See in general Gillen *et al. Corporations and Partnerships: Canada* 19; LaRue Stewart *Law and Business Review of the Americas* 215 – 234; Faken Martineau DuMoulin LLP *Canada Business Corporations Act & Commentary* (LexisNexis 2016); McGuinness KP *Canadian Business Corporations Law* 2nd ed (LexisNexis 2007) for more on the *CBCA*. For more on federal power to incorporate see Welling *Corporate Law in Canada: The Governing Principles* 22 – 29.

[220] Cooperative Credit Associations Act S.C. 1991, c. 48.

[221] Trust and Loan Companies Act S.C. 1991 c. 45.

[222] Section 3 of the CBCA.

[223] Canada Not-For-Profit Corporations Act (CNCA) SC 2009, c23.

extent provided for in part 19,[224] to body corporates without share capital incorporated by a special Act of Parliament.[225] A corporation's governing document is its articles of association. In terms of section 102(1) of the CBCA, the directors are directed to manage or supervise the management of the business and affairs of the corporation. The CBCA[226] provides that these powers may be delegated, although subject to certain limitations.[227]

In Ontario, the leading corporate law legislation is the Ontario Corporations Act and the OBCA.[228] These two Acts are different insofar as the Ontario Corporations Act applies to social companies as defined in this Act and does not apply to any corporation or body corporates to which the OBCA applies. The Ontario Corporations Act applies to higher education institutions. A corporation may be incorporated under the OBCA[229] with its powers restricted by its articles of incorporation.[230] The Not-For-Profit

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[224] This section is entitled "Special Act Bodies Corporate without Share Capital." In terms of s 3(4), incorporation or continuance under this Act does not confer any authority on a corporation to carry on activities as a degree-granting educational institution or to regulate any activity, including a profession or trade. It does not apply to higher education institutions.

[225] If the CBCA applies to a corporation, the CNCA will not apply. The CBCA also does not apply to higher education institutions.

[226] Section 115(1) and (3).

[227] The CBCA therefore applies to all federally incorporated corporations. VanDuzer AJ *The Law of Partnerships & Corporations* 3ed (Irwin Law 2009) 97.

[228] For a brief history on the OBCA, see Lavine S *The Business Corporations Act: An Analysis* (The Carswell Company Limited 1971) 1 – 4.

[229] Section 3(2) of the OBCA. On incorporation in Ontario, see McGuinness *Canadian Business Corporation Law* 8 – 11. On provincial power to regulate corporations, see Welling *Corporate Law in Canada: The Governing Principles* 12 – 21.

[230] The powers are restricted to lending and investing money on mortgage of real estate or otherwise, or with its powers restricted by its articles to accepting and executing the office of liquidator, receiver, assignee, trustee in bankruptcy or trustee for the benefit of creditors and to accepting the duty of and acting generally in the winding up of corporations, partnerships and estates, other than estates of deceased persons, and shall not by reason thereof be deemed to be a corporation within the meaning of the Loan and Trust Corporations Act. The number of its shareholders, exclusive of persons who are in the employment of the corporation, shall be limited by its articles of incorporation to five, and no such corporation shall issue debt obligations except to its

Corporations Act of 2010 does not replace or repeal the Ontario Corporations Act; it only repeals section 2 of the Corporations Act and makes other amendments.[231] Public higher education institutions are considered not-for-profit corporations and the ONCA will, therefore, be applicable once it comes into effect.[232] The ONCA is scheduled to come into effect in 2020 after Bill 154 has been passed.[233] It will clarify the rules for governing a corporation and increase accountability; it will clarify that not-for-profit corporations may earn "profit" through commercial activities; provide an alternative option to audits for these entities; enhance the rights and responsibilities of members, and provide for actions to be taken when members do not act in the best interest of the entity.[234] This Act, once it has commenced will provide for among other things the removal of directors (section 26); declaration of a conflict of interest in a contract (section 41); the standard of care (section 43); and the business judgment rule (section 44). It is important to take note of these provisions as some of the amendments recommended in this thesis are similar.

(a) Management of a corporation

Under the CBCA, OBCA and the Ontario Corporations Act, the control and management of a corporation are divided among the shareholders, directors and officers. The shareholders make a financial investment in the corporation, which then, in turn, provides a shareholder with certain rights,

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shareholders, or borrow money on the security of its property except from its shareholders, or receive money on deposit or offer its securities to the public.

[231] It should be noted that the CNCA is federal legislation whilst the ONCA is specific to the state of Ontario.

[232] See Carter TS and Man TLM "The Nuts and Bolts of the Ontario Not-For-Profit Corporations Act, 2010" 2011 (IX) *International Journal of Civil Society*.

[233] See the Ontario Non Profit Network "Ontario Not For Profit Corporations Act" https://theonn.ca/our-work/our-regulatory-environment/onca/ (access on: 3 December 2018).

[234] See "Rules for not-for-profit and charitable corporations" https://www.ontario.ca/page/rules-not-profit-and-charitable-corporations (Date of use: 3 December 2018).

like voting and election of directors. However, the shareholders' involvement is limited to fundamental decisions like the sale of a business or the winding up of the corporation. The directors and officers of a company have the responsibility for the day-to-day management of a corporation. Both the CBCA[235] and the OBCA[236] restrict how directors may delegate their responsibilities. It is up to each board of directors to implement policies and procedures as well as to impose internal control systems to restrict and regulate the manner in which the delegated authority is exercised within the corporation.[237] The Ontario Corporations Act does not provide for directors to delegate their functions.

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[235] Section 115(1) provides as follows: "Directors of a corporation may appoint from their number a managing director who is a resident Canadian or a committee of directors and delegate to such managing director or committee any of the powers of the directors." Section 115(3) places limitations on the delegation of authority of directors as follows: "Notwithstanding subsection (1), no managing director and no committee of directors has authority to submit to the shareholders any question or matter requiring the approval of the shareholders; fill a vacancy among the directors or in the office of auditor, or appoint additional directors; issue securities except as authorized by the directors; issue shares of a series under section 27 except as authorized by the directors; declare dividends; purchase, redeem or otherwise acquire shares issued by the corporation; pay a commission referred to in section 41 except as authorized by the directors; approve a management proxy circular referred to in Part XIII; approve a take-over bid circular or directors' circular referred to in Part XVII; approve any financial statements referred to in section 155; or adopt, amend or repeal by-laws."

[236] Section 127(1) provides as follows: "Subject to the articles or by-laws, directors of a corporation may appoint from their number a managing director or a committee of directors and delegate to such managing director or committee any of the powers of the directors." Section 127(3) provides for the limitations as follows: no managing director and no committee of directors has authority to submit to the shareholders any question or matter requiring the approval of the shareholders; fill a vacancy among the directors or in the office of auditor or appoint or remove any of the chief executive officers, however designated, the chief financial officer, however designated, the chair or the president of the corporation; subject to section 184, issue securities except in the manner and on the terms authorized by the directors; declare dividends; purchase, redeem or otherwise acquire shares issued by the corporation; pay a commission referred to in section 37; approve a management information circular referred to in Part VIII; approve a take-over bid circular, director's circular or issuer bid circular referred to in Part XX of the Securities Act; approve any financial statements referred to in clause 154 (1) (b) of the Act and Part XVIII of the Securities Act; approve an amalgamation under section 177 or an amendment to the articles under subsection 168 (2) or (4); or adopt, amend or repeal by-laws."

[237] McGuinness *Canadian Business Corporate Law* 835; Institute of Directors "Directors Responsibilities in Canada" 2014 Osler 4-5; Calkoen WJL *The Corporate Governance Review* 7th ed (The Law Reviews 2017) 67; Reiter BJ *Directors Duties in Canada* (LexisNexis 2016) 14 – 15.

(b) Fiduciary duties of directors

Directors and officers are responsible for the management of the business and affairs of the corporation. This is governed by the corporate statute of each province. In performing their mandate, directors have two main types of duty that are imposed on both directors and officers, namely, a duty of care and one of loyalty and good faith.[238] Directors cannot choose to contract out of these duties and may be held personally liable for breaching them.[239] The duty of care requires the director to invest adequate time, act carefully, make informed decisions and act with the diligence and skill that a reasonably prudent person would exercise in similar circumstances.[240] In accordance with the duty of loyalty, a director must act honestly and in good faith, in the best interests of the corporation.[241]

The CBCA, OBCA and the Ontario Corporations Act impose these duties.[242] The CBCA reinforces the common law fiduciary duties of directors of federally incorporated companies in addition to the fiduciary duties owed by them.[243] The CBCA,[244] CNCA,[245] OBCA[246] and the Ontario Corporations Act[247]

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[238] Nicholls *Corporate Law* 285; Reiter *Directors Duties in Canada* 35 – 36.

[239] See Institute of Corporate Directors (Osler) "Director's responsibilities in Canada" (October 2014); https://www.icd.ca/getmedia/581897ca-d69d-4d4f-a2a2-ca6b06ef223b/5467_Osler_Directors_Responsibilities_-Canada-FINAL.pdf.aspx (accessed on 16 April 2016) 7.

[240] Reiter *Directors Duties in Canada* 49 – 57.

[241] Reiter *Directors Duties in Canada* 37 – 49.

[242] Once the ONCA commences, it will also provide for fiduciary duties. See Van Duzer *The Law of Partnerships & Corporations* 339.

243 The fiduciary duties and duty of care and skill are contained in s 122 of the CBCA, which provides as follows: "(1) Every director and officer of a corporation in exercising their powers and discharging their duties shall (a) act honestly and in good faith with a view to the best interests of the corporation; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. (2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement." See also Kitching A "Director's Liability under the Canada Business Corporations Act" (October 2008) *Library of Parliament* Fasken Martineau DuMoulin LLP *Canada Business Corporations Act & Commentary* 83 – 99.

provide for fiduciary duties[248] as well as duties of care.[249] The ONCA, once in force, will also contain similar provisions to the CBCA, CNCA and the OBCA concerning fiduciary duties and standards of directors' conduct.[250]

The OBCA in section 134(1) and the Ontario Corporations Act in section 127(1) provide for both duties as follows:[251]

> Every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall (a) act honestly and in good faith with a view to the best interests of the corporation;[252] and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.[253]

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[244] Part X of the CBCA pertains to Directors and Officers.

[245] Section 148.

[246] Part IX of the OBCA pertains to Directors and Officers.

[247] Section 127(1) of the Ontario Corporations Act.

[248] In *LAC Minerals v International Corona Resources Ltd* (1989) 61 D.L.R (4th) 14 (S.C.C) the Supreme Court of Canada found that a fiduciary relationship generally has three characteristics namely (a) the fiduciary has scope for the exercise of some power of discretion; (b) the fiduciary can unilaterally exercise this power of discretion so as to affect the beneficiary's legal or practical interest; and (c) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion of power. See Fasken Martineau DuMoulin LLP *Canada Business Corporations Act & Commentary* 85; *Frame v Smith* (1987) 2 S.C.R 99 (Canada) which is the leading case of this definition; Hansell C *Directors and Officers in Canada: Law and Practice* (Carswell 2013, Vol 2) 9-2.

[249] Levin JA, Shakeel B and Campbell F "Director's and Officers' Duties and Responsibilities (Paper presented at the Corporate Summit Toronto, November 1995) 12 – 13.

[250] Carter TS and Prendergast MP "Duties and Liabilities of Directors and Officers of charities and Non-Profit Organisations" 2011 *The Law Society of Upper Canada* – Emerging issues in Director's and Officer's Liability 2011.

[251] The duties are identical in the CBCA and CNCA: s 122 (1) of the CBCA; s148 (1) of the CBCA; and s 43(1) of the ONCA. For a discussion of these duties as contained in the CBCA, see Sopow N *Directors and Standards: The Problem of Insufficient Guidance* (Published LLM thesis University of Western Ontario 2016) 1 – 60.

[252] See Hansell *Directors and Officers in Canada: Law and Practice* 9-19. This formulation is similar to s 76(2) (a) and (b) of the South African Companies Act of 2008: see Chapter 4, para 4.2.5 above for a discussion of these duties in South Africa.

[253] This provision includes both the duty of good faith/loyalty and the duty of care. This formulation is similar to s 76(2) (c) of the South African Companies Act of 2008. It is important to note that similar to South Africa, the fiduciary obligation and duties of care are regarded as separate duties. See Wellington *Corporate Law in Canada: The*

The duty of loyalty and good faith has been codified in Canadian corporate statutes.[254] This duty requires each director to act in the best interests of the corporation;[255] to recognise and avoid conflicts of interest; not to divulge confidential information received in their capacity as director and not use that information for personal gain to the disadvantage of the corporation. Furthermore, a director may not divert opportunities for his/her personal benefit or the benefit of any other business if the corporation itself can benefit from the opportunity.[256] The duty of loyalty and good faith is owed to the corporation, and not to the shareholders or creditors[257] unless there are special circumstances establishing a fiduciary relationship between a director and a shareholder or creditor.[258] The Canadian Supreme Court

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Governing Principles 327; Wellington B, Smith L and Rotman LI *Canadian Corporate Law: Cases, Notes and Materials* (LexisNexis 2006) 316 – 321.

[254] See in general Gray WD "A Solicitor's perspective on Peoples v Wise" 2004 – 2005 *Can Bus LJ* 185 – 187. This duty has been codified virtually the same in all the statues.

[255] *Beamish v Solnick* (1980) 10 B.L.R 224 (Ont. H.C) citing the Business Corporations Act. In this matter it was found that the defendant director in a two-person corporation who refused to sign necessary closing documentation that was in the best interests of the corporation, was in breach of his fiduciary duty in terms of s 122 (1) and was liable for damages incurred to the corporation as well as liable to the plaintiff personally for a portion of his damages resulting from his loss of guarantee.

[256] See in general Tory's LLP "Responsibilities of Directors in Canada" 16 file:///C:/Users/corliavdw/Downloads/Responsibilities of Directors%20(5).pdf (Date of use: 16 April 2016). Reiter *Directors' Duties in Canada* 37 – 42; McGuinness *The Law and Practice of Canadian Business Corporations* (Butterworths 1999) 690 – 691; Broder and McClintock *A Primer for Directors of not-for-profit corporations* 21. The position is similar in South Africa with the corporate opportunity rule, see Chapter 4, para 4.2.5(a); s 76(2)(a) – this section does not specifically mention for the benefit of another business, but this can be inferred because opportunities meant for a company cannot be diverted to another.

[257] *Peoples Department Stores v Wise Inc* (2004) 3 S.C.R; *BCE v 1976 Debentureholders* (2008) 3 S.C.R. See Gray 2004 – 2005 *Can Bus LJ* 186.

[258] Kaufman JA, Catton J and Fabiano D "The Role of the Director today: Do you really want this job?" *Fasken Martineau* http://www.fasken.com/files/Publication/4a5725ea-c345-4013-a9e4-07eb8947d0d4/Presentation/PublicationAttachment/9203d1dd-0bf5-4517-b5b4-23ea77858ae9/The_Role_of_the_Director_Today.pdf; Kearns "Institutional Autonomy in Higher Education: A strategic approach" 1998 (22) *Public Productivity & Management Review* (See also *Dylex Ltd (Trustee of) v Anderson* (2003), 63 OR (3d) 659 at para 20; and *Peoples Department Store Inc v Wise* (2004) 3 R.S.C 466 – 467 which states that a duty is owed to creditors, although it is not a fiduciary duty.

confirmed in *Peoples Department Stores Inc (trustee of) v Wise*[259] that directors do not owe a fiduciary duty to creditors, the duty is owed to the corporation.[260] More specifically, the court recognised that directors owe the statutory fiduciary duty to the corporation, and not to any stakeholder that may have a financial interest in the corporation.[261] The decision in the

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[259] (2004) 3 S.R.C. 461. Hereinafter referred to as *"the Peoples matter."* In this matter, Peoples Department Stores Inc was wholly owned by Wise Stores Inc. Wise Stores was a public corporation and three brothers were the shareholders as well as directors of this corporation. In February 1994, the shareholders decided to implement a joint inventory procurement policy for the retail stores of both these corporations. The Peoples Store was to purchase all stock from North America, while Wise Stores would purchase from outside North America. In terms of this policy, the two corporations would share the responsibility for purchasing. By December 1994, bankruptcy proceedings in terms of the Bankruptcy and Insolvency Act were instituted against both corporations. Soon after the insolvency proceedings started, the Peoples Store trustee brought an action against the Wise brothers in their capacity as directors, alleging that they, by implementing the inventory procurement policy, had breached both their duties of loyalty and care in terms of section 122(a) and (b) of the CBCA, acting in favour of Wise Stores to the prejudice of Peoples Stores and to the detriment of the creditors of the Peoples Stores. The court *a quo* found in favour of the claimant while adopting the principle that the director's duties of loyalty and care also extended to creditors when a corporation was facing bankruptcy. The court found that by implementing the inventory procurement policy by the Wise brothers, a breach of both duties had occurred in relation to Peoples Stores. The Quebec Court of Appeal, however, overturned this decision and adopted the position that the duties of directors are not owed to creditors. The court held that although directors may consider the interests of various groups of stakeholders, it is not a requirement that they do so. The court further confirmed that the interests of the corporation are the most important and should not be confused with the interests of any stakeholders. The Supreme Court of Canada subsequently also dismissed the appeal by the trustee in bankruptcy and upheld the ruling by the Quebec Court of Appeal. This is one of the leading cases in Canadian law pertaining to director's fiduciary duties and whom they are owed to. See in general, Thomson D "Directors, Creditors and Insolvency: A Fiduciary Duty or a Duty not to Oppress?" 2000 *University of Toronto Faculty of Law Review* 31 36. See in general, Khimji MF "Peoples v Wise – Conflating Director's duties, oppression, and stakeholder protection" 2006 *U.B.C. Law Review* 217 – 225); Francis C "Peoples Department Stores Inc v Wise: The Expanded Scope of Directors' and Officers' Fiduciary Duties and Duties of Care" 2004 – 2005 *Can Bus LJ* 175 – 183; Fasken Martineau DuMoulin LLP *Canada Business Corporations Act & Commentary* 88 – 89; and the discussion of this case in Wellington, Smith and Rotman *Canadian Corporate Law: Cases, Notes and Materials* 312 – 316; Gray 2004 – 2005 *Can Bus LJ* 186; Iacobucci E "Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties" (2009) *Can. Bus. L.J* 234; and Francis 2005 *Can Bus LJ* 178.

[260] See *Peoples Department Store Inc v Wise* (2004) 3 R.S.C. 466 – 467; *Royal Bank v First Pioneer Investments Ltd* (1979) 27 O.R. (2d) confirming that there are no authorities confirming that a director owes a fiduciary duty to the creditors of the company.

[261] See in general, MacPherson DL "The Supreme Court Reinstates Director's Duty – A Comment on *Peoples Department Stores v Wise*" 2005 *Alberta Law Review* 383 – 405; Lee IB "*Peoples Department Stores v Wise* and the "Best Interest of the Corporation" 2005 *Canadian Business Law Journal* 212 – 222; Gray 2005 *Canadian Business Law Journal* 184 – 199; Francis 2005 *Canadian Business Law Journal* 175 – 183; Alexander

Peoples matter was confirmed in *BCE v 1976 Debentureholders*[262] where the court considered the interests of a corporation in a takeover situation.[263]

(c) Duty of care

In addition to the duty of loyalty and good faith, a director must also "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."[264] In terms of the common law, directors are only required to demonstrate the degree of care, diligence and skill that could reasonably be expected of his/her having regard to his/her knowledge and experience. The court in the *Peoples* matter distinguished between section 122(1)(a) and (b) of the CBCA.[265] In the *Peoples* matter, the court confirmed the objective test for the duty of care, and pronounced that "….directors and officers will not be held to be in breach of their duty of care under section 122 (1) (b) of the CBCA if they act prudently and on a reasonably informed basis."[266]

SM *Directors Duties under the CBCA: Shareholder Theory versus Stakeholder Theory Consideration of Stakeholder Theory's Legal and Moral Supremacy* (Published LLM thesis University of Toronto 2012) 1 – 53.

[262] (2008) 3 S.C.R. This was a second landmark case, confirming that a fiduciary duty and the duty of care are owed to the corporation and not to other stakeholders, although other stakeholder rights may be considered. See Fasken Martineau DuMoulin LLP *Canada Business Corporations Act & Commentary* 89.

[263] In the *BCE v 1976 Debentureholders* matter, the Supreme Court upheld the precedent established in the *Peoples* matter and confirmed that the directors must act in the best interests of the corporation, and in doing so, may consider the interests of various stakeholders. However, there is no requirement for them to do so. See in general, Bradley SP "*BCE Inc v 1976 Debentureholders*: The new Fiduciary duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?" 2009 – 2010 *Ottawa Law Review* 327 – 349; Du Pont G and Genest A "The BCE Litigation: Revising Duties of Directors, Plans of Arrangement and the Oppression Remedy" 2008 *Canadian Tax Foundation* 1 – 24.

[264] Section 134(b) of the OBCA. See Tory's *Responsibilities of Directors* file:///C:/Users/corliavdw/Downloads/Responsibilities_of_Directors%20(2).pdf 17 (Date of use: 28 August 2018).

[265] Gray 2004 – 2005 *Can Bus LJ* 186.

[266] (2004) 3 R.C.S. 463. See Institute of Corporate Directors (Osler) "Director's Responsibilities in Canada" (October 2014) 9; Broder and McClintock "Primer for Directors of Not-For-Profit Corporations: Rights, Duties and Practices" 16; Cassels Brook Attorneys "Fiduciary Duty and the Duty of Care owed only to the Corporation"

In order to meet the requirement of diligence, directors must ensure that they are informed about and obtain expert advice on specific issues. However, a director may nonetheless be deemed to have been diligent if he/she had been misled or received incorrect information. There is no requirement for a director to have any particular education or experience, which is similar to the position in South Africa.[267]

The decisions of directors and officers must be reasonable business decisions considering all circumstances, including the prevailing socio-economic conditions. The courts are reluctant to second-guess the application of business expertise in corporate decision-making.[268]

(d) Removal of directors

Section 122 (1) and (2) of the OBCA provide for the removal of directors as follows:[269]

> (1) Subject to clause 120 (f), the shareholders of a corporation may by ordinary resolution at an annual or special meeting remove any director or directors from office.
> (2) Where the holders of any class or series of shares of a corporation have an exclusive right to elect one or more directors, a director so elected may only be removed by an ordinary resolution at a meeting of the shareholders of that class or series.

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http://www.casselsbrock.com/Doc/Fiduciary_Duty_and_Duty_of_Care_Owed_Only_to_the_Corporation_17311 (Date of use: 16 August 2018).

[267] Institute of Corporate Directors (Osler) "Director's Responsibilities in Canada"10; Reiter *Directors' Duties in Canada* 49 – 53.

[268] Feltham IR and Rauenbusch WR "Director's and Officer's Liabilities in Canada" (1976) *Can Bus LJ* 327; Broder and McClintock "Primer for Directors of Not-For-Profit Corporations: Rights, Duties and Practices" 17; Osler "Directors Duties in Canada" 10.

[269] The CBCA makes a similar provision in s 109(2). Furthermore, sections 26(1) and (2) ONPCA also have a similar provision, except that they refer to members and not directors. Nathan HR "Removal of Directors by Corporations" Minden Gross LLP http://www.mindengross.com/docs/publications/removal-of-directors-of-business-corporations (Date of use: 28 August 2018).

The Ontario Corporations Act also provides for the removal of directors in section 127(2) and states the following:

> (1) The members of a corporation may, be passing a majority of the votes cast at a general meeting, of which notice specifying the intention to pass such resolution has been given, remove from office any director or directors, except persons who are directors by virtue of their office.
> (2) A director elected by a group of members that has an exclusive right to elect the director may be removed only by a resolution passed by a majority of the votes cast by the members of that group at a general meeting of which notice specifying the intention to pass such resolution has been given.

In South Africa, both the shareholders and the directors may remove a director in terms of the Companies Act of 2008. There is no provision in any of the Canadian acts providing directors with the opportunity to make representations before their removal is put to the vote.[270] In addition to having to comply with the Ontario Corporations Act, universities are also subject to their own incorporating statutes which could make provision for the removal of management.[271] There are no statutory provisions in Canada that provide for delinquency declarations in respect of directors, as provided for in the South African Companies Act of 2008.[272]

5.3.3 Corporate governance

Corporate governance practices in Canada are shaped by statutes such as the CBCA and the OBCA[273] as well as best practices.[274]

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[270] See Chapter 4, para 4.2.9 above for a discussion of the removal of directors in South Africa.

[271] See para 5.5.2 below for a discussion of higher education institutions in Canada.

[272] See Chapter 4, para 4.2.10 above for a discussion about delinquency proceedings against directors in South Africa.

[273] See para 5.3.4(a) below for a discussion of the governance provisions of these two Acts.

[274] Calkoen *The Corporate Governance Review* 64; the Institute of Directors promote good governance in Canada. See their website for more information http://www.icd.ca/About-the-ICD/Corporate-Governance.aspx (Date of use: 20 August 2018).

Corporate governance regimes in Canada and the United States differ in some fundamental respects, although there are certain similarities.[275] Canada, like South Africa, prefers a "principles-based" approach, with the exception of mandatory rules relating to audit committees and the requirement that companies disclose the extent of their compliance with the suggested "best practices" in Canada.[276] The Canadian corporate governance regime is one of *voluntary adoption* of best practices but with *mandatory disclosure* of either the adoption of these best practices or disclosure of how the corporation intends to achieve its goals.[277] Canada follows a "comply or explain" approach, which is different from the "apply and explain" approach of South Africa.[278] Canada does not have a code similar to *King IV* in South Africa. Instead, various guidelines and best practices apply, for example, the *National Policy 58-201* (Corporate Governance Guidelines),[279] *National Instrument 58-101* (Disclosure of Corporate Governance Practices), and *Multilateral Instrument 52-110* (Audit Committees).[280] *National Policy 58-201* applies to all reporting issuers other than investment funds; it, therefore, applies to both corporate and non-corporate entities. However, these are guidelines which are not

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[275] For more on the model of corporate governance in Canada see Liao C "A Canadian Model of Corporate Governance" 2014 *Dalhousie Law Journal*.

[276] Broschko and Li 2006 *Canadian Investment Review forthcoming* 1.

[277] National Instrument 58-101 para 2.1; Salterio SE, Conrod JED and Schmidt RN "Canadian Evidence of Adherence to 'Comply or Explain' Corporate Governance Codes: An International Comparison" 2013 *Accounting Perspectives* 27*;* MacAulay K *et al*. "The Impact of a Change in Corporate Governance Regulations on Firms in Canada" 2009 *Quarterly Journal of Finance and Accounting* 30; 32 – 34.

[278] According to the "comply or explain" approach in Canada, the provincial corporate regulation establishes mandatory disclosure of governance. Therefore, corporations can be compliant with these requirements by either complying with them or by explaining why they are non-compliant. See Salterio, Conrod and Schmidt 2013 *Accounting Perspectives* 23. See Chapter 4, para 4.4.3 above for a discussion of the position in South Africa.

[279]For this policy, see http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule 20050415 58-201 gov-practices 2.pdf (Date of use: 28 August 2018). It came into effect on 30 June 2005.

[280] See in general, Broshko and Li2006 *Canadian Investment Review forthcoming* 1 – 5.

meant to be prescriptive, and users are "encouraged" to develop their own corporate governance practices.[281] *National Instrument 58-101* contains disclosure of corporate governance practices, and it applies to a reporting issuer other than an investment fund or issuer of asset-backed securities, as defined in *National Instrument 51-102*; a designated foreign issuer or SEC foreign issuer as defined in *National Instrument 71-102;*[282] an exchangeable security issuer or credit support issuer that is exempt under para 13.3 or 13.4 of *National Instrument 51-102*; an issuer that is a subsidiary entity if the issuer does not have equity securities, other than non-convertible, non-participating preferred securities, trading on a marketplace, and the person or persons who own the issuer are subject to the requirements of this instrument, or an issuer who has securities listed or quoted on a USA marketplace and is in compliance with the corporate governance requirements of that USA marketplace.[283] These requirements apply to all corporations listed on the Toronto Stock Exchange (TSX), with less extensive disclosure provisions required for TSX Venture companies.[284] The Canada Securities Administrators (CSA) announced in 2002 that each province would be responsible for ensuring the enforcement of the TSX "comply or explain" code.[285] The Canadian policies and instruments referred

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[281] See para 1.2 of National Policy 58-201. These guidelines are only four pages long and cover board composition (para 3.1 and 3.2); meetings of independent directors (para 3.3); board mandate (para 3.4); position descriptions (para 3.5); orientation and continuing education (para 3.6, 3.7); code of business conduct and ethics (para 3.8 and 3.9); nomination of directors (para 3.10 – 3.14); compensation (para 3.15 – 3.17); and regular board assessments (para 3.18).

[282] *National Instrument 51-102* relates to the Continuous Disclosure and Other Exemptions Relating to Foreign Issuers.

[283] See the full national instrument 58-101 on http://www.albertasecurities.com/Regulatory%20Instruments/5328198-v1-58-101_NI_Consolidation_Eff_Dec_31_2016.pdf (Date of use: 20 August 2018). There is also the National Instrument 13-101 which relates to the System for Electronic Document Analysis and Retrieval (SEDAR).

[284] Salterio, Conrod and Schmidt 2013 *Accounting Perspectives* 27.

[285] The corporate governance code of the TSX consists of the following: Corporate Governance Policy, National Policy 58-201 and National Instrument 58-101 and the guide to Good Disclosure; see https://www.tsx.com/listings/tsx-and-tsxv-issuer-resources/tsx-issuer-resources/corporate-governance (Date of use: 20 August 2018).

to above are significantly influenced by the USA SOX Act of 2002, the *USA Stock Exchange Listing Requirements (NYSE)* as well as the "comply or explain" regime of the United Kingdom.[286] In Canada, securities regulation plays a vital role in both the economy and corporate governance, which is also the case in South Africa and the USA.[287] The TSX is the primary securities regulator in Canada. As a result of the turmoil in the USA markets during 2002, Canada wanted to re-establish investor confidence in Canadian securities. The Keeping the Promise for a Strong Economy Act (Budget Measures)[288] became effective on 7 April 2003 and provides for securities regulation in Ontario. This Act is based on SOX in the USA and introduced significant amendments to the Ontario Securities Act.[289] The TSX has also adopted governance standards applicable for listed companies.[290]

(a) Corporate governance provisions of the CBCA and the OBCA

Both the CBCA and the OBCA provide for processes and structures used to direct and manage the business and affairs of the corporation with the objective of enhancing the shareholders' interests.[291] The OBCA provides

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[286] Salterio, Conrod and Schmidt 2013 *Accounting Perspectives* 28.

[287] See Chapter 4, para 4.4.1 above for a discussion of securities regulation in South Africa and para 5.2.4 above for a discussion of securities regulation in the USA.

[288] The Keeping the Promise for a Strong Economy Act (Budget Measures) S.O. 22; also known as Bill 198. See in general Green R "Canada's Bill 198 similar to US's Sarbanes Oxley Act" August 2014 http://www.asyma.com/blog/canadas-bill-198-similar-to-u.s.s-sarbanes-oxley-act (Date of use: 28August 2018); see Bill 198 on https://www.ontario.ca/laws/statute/S02022 (Date of use: 21 August 2018); Lampe J and Spiro M "Corporate Governance Developments in Canada" Goodmans LLP http://www.goodmans.ca/docs/Corporate%20Governance%20Developments%20in%20Canada.pdf (Date of use: 21 August 2018); Emerson HG and Clarke GA "Bill 198 and Ontario's Securities Act: Giving Investors and the OSC added muscle" 2003 *Fasken Martineau.*

[289] Ontario Securities Act R.S.O. 1990 S.5.

[290]See Toronto Stock Exchange Corporate Governance https://www.tsx.com/listings/tsx-and-tsxv-issuer-resources/tsx-issuer-resources/corporate-governance (Date of use: 21 August 2018).

[291] The CBCA is not discussed in much detail here as the focus remains on corporate governance in Ontario, Canada.

the foundation of corporate governance in Ontario. The OBCA prescribes certain requirements in respect of the structure of the board. Corporations that are "offering"[292] or "distributing" shares must have at least three directors;[293] directors must be 18 years or older, of sound mind and must not be bankrupt;[294] and at least twenty-five percent of the directors must be Canadian residents.[295] The OBCA also requires one-third of the directors of an offering company to be independent.[296] Directors are elected by shareholders at each general meeting. If directors are not elected, the previously elected director will remain in his/her position until a successor has been elected.[297] The Act also provides for the fiduciary duties of directors as well as their duty of care.[298] Both the OBCA and the CBCA require offering or distributing companies to have an audit committee, consisting of a minimum of three directors, each of whom must be independent of the corporation. The audit committee is responsible for reviewing the corporation's annual financial statements.[299] Except for the requirement of an audit committee for companies in Ontario, no other committees are prescribed in terms of the OBCA, and it is left to companies

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[292] Is defined in the OBCA as a corporation offering securities to the public.

[293] Section 115(2)(b) of the OBCA, s 102(2) of the CBCA.

[294] Section 118(1) of the OBCA; s 105 (1) of the CBCA.

[295] Section 118(3) of the OBCA; s 105(3) of the CBCA.

[296] Section 115(3) of the OBCA; s 102(2) of the CBCA requires that at least two directors be independent.

[297] Section 119 of the OBCA; s 106 of the CBCA.

[298] Section 134 of the OBCA. The fiduciary duties of directors are discussed in para 5.3.2 above.

[299] Section 158(2) of the OBCA; s 171(3) of the CBCA. See Chapter 4, para 4.4.4(b) above for a discussion of the audit committee requirements for a public company in South Africa. See also Multilateral Instrument 52-110 relating to audit committees. See in general, Tory's LLP "Responsibilities of Directors in Canada" 2009 8 – 11; Campbell N "Holding Audit Committees Accountable" 1990 *Canada Business Law Journal* 134 – 159.

to constitute appropriate committees and to delegate certain functions to them.[300]

(b) Voluntary associations promoting good governance

Various voluntary associations promote good governance amongst corporations in Canada. One of these associations is the Canadian Coalition of Good Governance (CCGC), which promotes good governance and represents the voice of the shareholder.[301] Another voluntary association is the Institute of Corporate Directors (ICD), which is committed to promoting high corporate governance standards.[302] The ICD published its corporate governance guidelines in 2012.[303]

5.4 THE BUSINESS JUDGMENT RULE

The business judgment rule originated in the USA and, more specifically, in the State of Louisiana, during the first half of the 19th century.[304] It was

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[300] Section 127 of the OBCA; Tory's LLP "Responsibilities of Directors in Canada" 2009 7.

[301] It is a voluntary association whose members are shareholders of companies in Canada. See in general http://www.ccgg.ca/ (Date of use: 21 May 2016). The website of this body lists various policies and best practices. Some of these policies include the following: Directors' Guidebook; Directors Compensation; Executive Compensation; Governance Monitoring, Voting and Shareholder Engagement. See in general https://www.ccgg.ca/index.cfm?pagepath=Policies&id=17581 (Date of use: 21 August 2018).

[302] For more information on the ICD, see https://www.icd.ca/About-the-ICD/Corporate-Governance.aspx (Date of use: 17 August 2016).

[303] See the guidelines on https://www.icd.ca/getmedia/7421107f-9197-4fa7-812a-840958d3eb6b/ICD-Corporate-Governance-Guidelines-(including-Board-Mandate).pdf.aspx (Date of use: 16 August 2016). The mandate, functions and responsibilities of the board of directors of the ICD are subject to the provisions of the ICD's bylaws, the Canada Corporation's Act and its regulations and the Canada Not-For-Profit Corporations Act.

[304] See *Percy v Millaudon* 8 Mart (n.s) 68, 1829 WL 1592 (La 1829). This case relates to the liability of directors for the wrongdoing of the bank's president and cashier. The court found that the directors were not liable, explaining that a bank director is not liable if he/she exercised ordinary care. See Scarborough R and Olderman R "Why does the FDIC sue bank officers? Exploring the boundaries of the business judgment rule in

developed by state courts in terms of common law.[305] According to this rule, there is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.[306] Thus, directors are able to rely on the protection of the business judgment rule where they have acted in good faith and in the best interest of the corporation in making business decisions, and are therefore not considered to have been in breach of their fiduciary duties.[307]

According to Bainbridge, the business judgment rule is poorly understood, as there is a lack of coherent and unified theory relating to it and its limitations. Bainbridge's theory is that this rule is designed to effect a compromise between two competing values: authority and accountability.[308] The duty of care determines the standard of conduct while the business judgment rule offers a balance by limiting judicial enquiry into business decisions made by directors acting in good faith and the best interests of the company.[309] The business judgment rule encompasses a series of

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the wake of the great recession" 2015 *Fordham Journal of Corporate & Financial Law* 373; C L.S 1829; McMillan 2013 *William & Mary Business Law Review* 526.

[305] Although this a common law principle, some of the states such as Delaware and Georgia went on to codify this rule in their corporate law codes.

[306] Westbrook AD "Does Banking Law have something to teach Corporations Law about Directors Duties?" 2016 *Washburn Law Journal* 400; see in general on the common law business judgment rule *Godbold v Branch Bank11* Ala 191, 199, 1847 WL 159; *Smith v Prattville* Mfg. Co 29 Ala 503 1857 (United States); *Percy v Millaudon* 8 Mart. (n.s) 68 1829 WL 1592 (La 1829) (United States); *Hodges v New England Screw* Co 1 RI 312 (1850) (United States); Arsht SS "The Business Judgment Rule Revisited" 1979 *Hofstra Law Review* 93.

[307] *Aronson v Lewis* 473 A.2d 805 (Del 1984); Hansen 1984 *The Business Lawyer* 1360 – 1361; Lynch JJ "The Business Judgment Rule Reconsidered" 1981 – 1982 *The Forum* 453 – 454; Sharfman BS "The Importance of the Business Judgment Rule" 2017 *NYU Journal of Law & Business* 29 – 30.

[308] Bainbridge SM "The Business Judgment Rule as Abstention Doctrine" 2004 *Vanderbilt Law Review* 84; McMillan 2013 *William & Mary Business Law Review* 526.

[309] See *Para-Medical Leasing Inc v Hangen* (1987) 739 P2d 717 (Wash Ct. App) where a director was sued for breach of the fiduciary duty of care and claimed protection under the business judgment rule. The court held that for corporate officers, the business judgment rule limits the agent's duty of care, stating "in considering the actions of a corporate officer, the business judgment rule rather than the standard of

presumptions relating to decisions made by directors. The presumptions only relate to the exercise of a director's judgment, although a conscious decision not to act can also fall within their ambit. There are three elements to the business judgment rule, namely, a threshold review of the objective financial interest of the board whose decision is under attack, a review of the board's subjective motivation and an objective review of the process by which it reached the decision under review.[310]

One of the leading cases relating to the business judgment rule is S*mith v Van Gorkom*. In this matter, shareholders challenged the decision of the board of Trans Union Corporation to recommend that shareholders vote in favour of a tender offer made by the purchaser. Two of the shareholders claimed that the directors did not act with the necessary due diligence in their decision and the company suffered damages due to the low purchase price. The court agreed and found that the directors had breached their duty of care and should not receive protection under the business judgment rule.[311]

The decision in *FDIC*[312] *v Loudermilk*[313] was significant in respect of the business judgment rule as applied in Georgia.[314] In this matter, FDIC sued

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ordinary care applies". See also Johnson 2005 *The Business Judgment Lawyer* 450; Pinto and Branson *Understanding Corporate Law* 3.

[310] The business judgment rule can be invoked by a board or a director when all the elements are present. The reviewing court will then determine whether the board made a decision to act or refrain from acting whether a majority of the board was disinterested with respect to the decision; whether the board carefully considered the issue and considered all available information before acting; and whether the decision was taken in good faith and in the best interest of the company. See Varallo GV, Dreisbach DA and Rohrbacher B *Fundamentals of Corporate Governance: A guide for Directors and Corporate Council* 2nd ed (American Bar Association 2009) 60 – 61.

[311] S*mith v Van Gorkom* 488 A2.d 858 (Del. 1985). Westbrook 2016 *Washburn Law Journal* 401 – 402; Roper JM "*Smith v Gorkom*: A Narrow Interpretation of the Business Judgment Rule" 1986 *Capital University Law Review* 729 – 738; Sharfman 2008 *Delaware Journal of Corporate Law* 288 – 309; Herzel L and Katz L "*Smith v Van Gorkom*: The Business judging Business Judgment" 1986 *The Business Lawyer* 1187 – 1193; Bainbridge 2004 *Vanderbilt Law Review* 92 – 95.

[312] FDIC is the Federal Deposit Insurance Corporation, a USA government corporation providing deposit insurance to depositors in the USA.

nine former officers and directors of the bank, alleging that they had been grossly negligent under Georgia tort law in their approval of ten commercial real estate loans, which resulted in the bank sustaining nearly $22 million in losses. The defendants argued that the business judgment rule relieved officers and directors from any liability for ordinary negligence. FDIC alleged that the business judgment rule was not part of the State of Georgia's common law, and even if it were, it did not apply to bank officers and directors. The District Court determined that the matter was unsettled under Georgia law and referred the matter to the Georgia Supreme Court. Subsequently, the Supreme Court reconciled the tension between the common law and the statute by splitting the common law business judgment rule in Georgia into two parts, namely, the final decision and the decision-making process. The Supreme Court thus concluded that Georgia's business judgment rule protects both bank and corporate directors and officers from ordinary negligence claims.[315] The decision in *Loudermilk* overruled previous decisions.[316] The court in *Loudermilk* confirmed that the Georgia business judgment rule no longer provided complete protection against liability where directors and officers made business decisions. The court explained that "….the rule in Georgia, as in other jurisdictions, acts as a presumption in favour of officers and directors

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[313] *FDIC v Loudermilk* 295 Ga 579, 596, 761 S.E.2d 332, 345 (2014). See Scarborough and Olderman 2015 (XX) *The Fordham Journal of Corporate & Financial Law* 381 – 382.

[314] See Scarborough and Olderman 2015 (XX) *The Fordham Journal of Corporate & Financial Law* 380 – 384 for a position on the business judgment rule in Georgia. Furthermore, see *Brock Built LLC v Blake* 300 Ga App 816, 821 2009.

[315] The District Court posed the following question to the Supreme Court: "Whether Georgia's business judgment rule precludes as a matter of law a claim for ordinary negligence against the officers and directors of a bank in a lawsuit brought by the FDIC as receiver for the banks." The District Court "was not convinced that Georgia law affords bank directors and officers the protection of the business judgment rule in a lawsuit by FDIC". See *Loudermilk* 984 F. Supp 1354, 1359 (2013); Mayson CG and Moore JC "Banking and Finance" 2017 *Georgia State University Law Review* 3 – 4.

[316] See *Flexible Products Co v Ervast* 284 Ga App 178, 643 S.E 2d 560, 564 (2007); *Brock Built LLC v Blake* 300 Ga. App 816, 822, 686 S.E.2d 425, 460 (2009). See in general, Scarborough and Olderman 2015 *Fordham Journal of Corporate & Financial Law* 380 – 384.

and generally precludes claims against officers and directors for their business decisions that sound in ordinary negligence."[317]

The business judgment rule in Georgia protects the wisdom of directors' and officers' decisions unless those decisions "were shown to be made without deliberation, without the requisite diligence and assess the facts and circumstances upon which the decisions are based, or in bad faith".[318] House Bill 192 was drafted in direct response to the Supreme Court's decision in *Loudermilk*.[319] In accordance with this Act, both the banking and corporate codes were amended to include a presumption that the process undertaken has been conducted in good faith unless evidence that demonstrates gross negligence is presented.[320] House Bill 192 codified the business judgment rule in the Georgia Corporations Code and confirmed that when a court considers claims regarding directors and officers decision-making process, the relevant standard will be gross negligence.[321]

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[317] *FDIC v Loudermilk* 295 Ga (2014) para 2.

[318] *Loudermilk* 295 Ga at 585, 761 S.E.2d at 338; Mayson and Moore 2017 *Georgia State University Law Review* 4-5.

[319] Mayson and Moore 2017 *Georgia State University Law Review* 5.

[320] Eversheds Sutherland "Georgia Governor signs into law revisions to business judgment rule, codifying protections for banking and corporate officers and directors" October 2017 https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/199370/Legal-Alert-Georgia-Governor-Signs-into-Law-Revisions-to-Business-Judgment-Rule-Codifying-Protections-for-Banking-and-Corporate-Officers-and-Directors (Date of use: 6 August 2018). The banking code can be found in the Georgia Code of 2017 in title 7; whilst the corporate code can be found in title 14; Cary MP "2016 Georgia Corporation and Business Organisation Case Law Developments" March 2017 *Bryan Cave LLP* 10 – 12. This matter is currently under appeal to the Eleventh Circuit Court in Georgia.

[321] See in general, Alston and Bird "Strengthening the Georgia Business Judgment Rule" 10 May 2017 https://www.alston.com/en/insights/publications/2017/05/strengthening-the-ga-business-judgment-rule (Date of use: 13 November 2018); Cobb Law "New Law Strengthens Georgia's Business Judgment Rule" 11 October 2017 https://cobblawgroup.net/blog/2017/10/11/new-law-strengthens-georgias-business-judgment-rule/ (Date of use: 13 November 2018).

The introduction of the business judgment rule in Canadian law began with an Ontario judgement, *Brant Investments v KeepRite Inc*[322] that involved a dispute between directors of the corporation and its minority shareholders. The Ontario Court of Appeal found that the directors had not acted oppressively, nor did they unfairly prejudice the minority shareholders. The Ontario Court of Appeal outlined the basis of the rule as follows: "Business decisions, honestly made, should not be subject to microscopic examination, there should be no interference simply because a decision is unpopular with the minority."[323] Following the *Brant Investments* decision, the business judgment rule was adopted by the Ontario Court of Appeal in *Maple Leaf Foods Inc v Schneider Corp*.[324] In this case, the minority shareholders brought an action against the directors of the company, alleging that the directors had disregarded the interests of the shareholders when they failed to provide Maple Leaf with an opportunity to outbid the successful purchaser of the business. The Ontario Court of Appeal, in considering whether the board had failed to discharge its duties, referred to the business judgment rule as follows:

> The law as it has evolved in Ontario and Delaware has the common requirement that the court must be satisfied that the directors have acted reasonably[325] and fairly. The

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[322] *Brant Investments v KeepRite Inc* (1990) O.J. No. 683, 3 O.R (3d) 289 at 301 (Ont. CA). McGuinness *The Law and Practice of Canadian Business Corporations* 774. For a full discussion of this case, see Puri P *et al. Cases, Materials and Notes on Partnerships and Canadian Business Corporations* 5th ed (Carswell 2011) 324 – 334.

[323] Reiter *Directors Duties in Canada 51* – 52.

[324] *Maple Leaf Foods Inc v Schneider Corp* (1998) O.J. No. 4142, 42 O.R. (3d) 177 at 192 (Ont. CA). Nicholls *Corporate Law* 305*; Pente Investment Management Ltd Schneider Corp* (1998) 42 O.R. (3d) 1998 (Carswell Ont 4035 (C.A); Puri *et al. Cases, Materials and Notes on Partnerships and Canadian Business Corporations* 334 – 340; Gray 2005 *Canadian Business Law Journal* 195 – 196; Anand A and Condon M "Weather, Leather and the Obligation to Disclose: *Kerr v Daniel Leather Inc*" 2006 *Osgoode Hall Law Journal* 738 – 739.

[325] According to Eisenberg MA, "[a] decision may be unreasonable if there are good reasons for and against the decision but under the circumstances a person of sound judgment, giving appropriate weight to the reasons for and against, would not have made the decision. Accordingly, a decision may be unreasonable even though it was supported by some affirmative reasons and was therefore explicable, although on balance objectively undesirable." Eisenberg 1997 *University of Miami Law Review* 584; Allaire Y and Rosseau S "To Govern in the Interest of the Corporation: What is the Board's Responsibility to Stakeholders Other than Shareholders?" 2015 *Journal of Management and Sustainability* 10.

> court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board, even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision…This formulation of deference to the decision of the board is known as the "business judgment rule.[326]

The business judgment rule is articulated in the CBCA,[327] OBCA and ONCA.[328] Section 135 (4) of the OBCA provides as follows:[329]

> a director is not liable under section 130 and has complied with his or her duties under subsection 134 (2) if the director exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on, (a) financial statements of the corporation represented to him or her by an officer of the corporation or in a written report of the auditor of the corporation to present fairly the financial position of the corporation in accordance with generally accepted accounting principles; (b) an interim or other financial report of the corporation represented to him or her by an officer of the corporation to present fairly the financial position of the

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[326] *Maple Leaf Foods Inc v Schneider Corp* (1998) O.J. No. 4142, 42 O.R. (3d) 177 at 192 (Ont. CA) at 36; Reiter *Directors Duties in Canada 52*. Also see *Peoples Department Stores Inc (trustees of) v Wise* (2004) S.C.J No 64 3 S.C.R 461 at 67 (S.C.C.) where the Supreme Court of Canada referred to *Maple Leaf Foods* with approval and described the business judgment rule as follows: "Directors and officers will not be held to be in breach of the duty of care under s 122(1)(b) of the CBCA if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision-making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be reasonable business decision at the time it was made. Daley H "Recent Developments in Directors and Officers Liability" Wardle Daley Bernstein LLP 3; see para 5.3.2(b) above for a discussion of the *Peoples Department Store* matter.

[327] Section 123 of the CBCA.

[328] Section 44 of the ONCA. Once it commences, it will be applicable to higher education institutions.

[329] The Corporations Act 1990 c.38 does not contain a similar provision; McGuinness *The Law and Practice of Canadian Business Corporations* 774. The focus in this chapter of the thesis remains on Ontario and therefore the version in the OBCA is discussed. The Ontario Corporations Act that is currently still applicable to higher education institutions does not contain similar provisions.

> corporation in accordance with generally accepted accounting principles; (c) a report or advice of an officer or employee of the corporation, where it is reasonable in the circumstances to rely on the report or advice; or (d) a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by any such person.

In *Stelco Inc (Re)* (2004) O.J. No. 4899 (S.J.C.)[330] Justice Farley voided the appointment of two new directors to the Stelco board of directors. The court emphasised the importance of other stakeholders' interests and applied the decision in the *Peoples matter,*[331] that "….although a judge supervising a CCA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind (i.e., that judges are not qualified to make business decisions). The court is not catapulted into the shoes of the board of directors, or to the seat of the chair of the board, when acting in its supervisory role in the restructuring process". The new directors successfully appealed the decision. The Ontario Court of Appeal found that a lower court had no authority in terms of the Companies' Creditors Arrangement Act of 1985[332] to interfere with the composition of a board. The Court of Appeal also found that the judge in the lower court had erred in failing to give effect to the business judgment rule by rejecting the suggestion that he should respect and give deference to the business judgment of the Board.[333]

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[330] *Stelco Inc (Re)* (2004) O.J. No. 4899 (S.J.C.). These new directors were associated with two companies who, along with other shareholders, would obtain 40% interest in Stelco through share accumulation during the company's restructuring. Judge Farley found that the remainder of the board felt that they had no option but to agree to the appointment due to concern that the shareholders would take over the board, with the goal of maximising shareholder value as opposed to building a better corporation. Stelco's unions opposed these appointments since they feared that the majority of shareholders would seek to raise the share prices in the hope of selling the shares for a profit. See Dube J "Courts' Role in the Boardroom – The Stelco Directors Case" 2005 – 2006 *Pratt's Journal Bankruptcy Law* 156 – 161.

[331] See a discussion of this matter in para 5.3.2(b) above.

[332] Companies' Creditors Arrangement Act R.S.C. 1985 c C36.

[333] Leon JS and Armstrong SJ "Business Judgment and Defensive Decision-Making: Directors and Officers Duties and Responsibilities after Peoples" *Fasken Martineau LLP* 12 – 15 http://www.fasken.com/files/Publication/f6c57e93-41dd-4ccb-a1cf-edab27d2d8de/Presentation/PublicationAttachment/1bdf40b6-1f92-41e3-a4b0-aeffdb1aec59/BUSINESSJUDGMENT.PDF (Date of use: 1 June 2016).

The application of the business judgment rule differs in the USA and Canada. The Canadian version of the business judgment rule requires that director's actions be in the best interests of the corporation only, and not in the interests of the creditors or shareholders, as is required under the USA version. The courts in the USA apply the business judgement rule by considering two factors, namely, the decision-making process, to determine whether the decision was adequately informed; and the reasonableness of the final decision.[334] In accordance with the USA version of the business judgment rule, directors will be protected if their decision was "rational" while the Canadian version requires that director's decisions must be "reasonable".[335] In *Unique Broadband Systems*, *Inc. (Re)*[336] 2014 ONCA 538, the Ontario Court of Appeal reaffirmed the duties of directors and officers and clarified the way in which the business judgment rule should be applied. The decision in this matter is significant from the perspective of corporate governance, and shareholders' rights in its confirmation of the following aspects: that independent or third-party advice may be necessary to justify executive compensation; the business judgment rule has no application where directors and officers make decisions that have no legitimate business purpose and are in breach of their fiduciary duties; and executive compensation agreements that are inconsistent with statutory fiduciary duties will not be enforced by the courts.[337]

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[334] Canada's approach is similar to the approach in South Africa - see Chapter 4 para 4.2.7 above for a discussion of the business judgment rule in South Africa. See Sopow *Directors and Standards: The Problem of Insufficient Guidance* 24.

[335] Tory's "Responsibilities of Directors in Canada" 11. A rational decision test is based on a gross negligence standard while a reasonable decision test is based on an ordinary negligence standard; Reiter *Directors Duties in Canada* 54*;* Puri *et al. Cases, Materials and Notes on Partnerships and Canadian Business Corporations* 5th ed 307.

[336] *Unique Broadband Systems, Inc. (Re)* 2014 ONCA 538.

[337] *Unique Broadband Systems Inc (Re)* 214 ONCA 538; Fleming M and Basmadjian A "Court of Appeal Clarifies Directors Fiduciary Duties and the Business Judgment Rule for Executive Compensation Matters" Dentons Securities Litigation http://www.canadiansecuritieslitigation.com/court-of-appeal-clarifies-directors-fiduciary-duties-and-the-business-judgment-rule-for-executive-compensation-matters (Date of use: 2 June 2016); Ritchie L, Gleason-Mercier C and MacDougal A "Ontario Court Of Appeal Upholds Finding of Breach of Fiduciary Duty Respecting Executive

Although the application in the various jurisdictions may differ slightly, the common purpose of the business judgment rule is to protect directors and officers that make reasonable and/or rational business decisions in the best interests of the corporation.

5.5 HIGHER EDUCATION

5.5.1 HIGHER EDUCATION IN THE USA

(a) Introduction

The first institutions of learning in the USA predate the American Revolution.[338] Local and state governments were responsible for the governance of higher education institutions.[339] Similarly, to South Africa in

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Compensation" 2014 https://www.osler.com/en/resources/governance/2014/ontario-court-of-appeal-upholds-finding-of-breach (Date of use: 23 August 2018).

[338] They were influenced by institutions in the United Kingdom. Harvard College was established in 1636, and between its founding and the American Revolution, nine colleges were established. Rudolph F *The American College and University: A History* (University of Georgia Press 1990) 3 – 22; Geiger RL *The History of American Higher Education: Learning and Culture from the founding to World War II* (Princeton University Press 2015) 1 – 8.

[339] See the matter of *Dartmouth College v Woodward* (1819) 17 US 518. During 1816, the state legislature of New Hampshire passed new laws that revised this charter and changed the college from private to public, how the trustees were selected as well as the duties of the trustees. The trustees at the time filed suit and alleged that this was against the Constitution. They relied on article 1, section 10 of the Constitution, which prevented the state from impairing on a contract. This decision was an important one for higher education in the USA as it not only clearly demarcated public and private institutions but it also solidified the autonomy of chartered institutions and protected them from interference from the government. The Court agreed with the college, and the law was struck down, allowing the college to proceed as a private college. For a full background of the historical development of higher education, see Thelin JR, Edwards JR and Moyen E "Higher Education in the United States – Historical Development" http://education.stateuniversity.com/pages/2044/Higher-Education-in-United-States.html (Date of use: 28 August 2018).
See a summary of the *Dartmouth College v Woodward* case on http://www.americanbar.org/groups/public_education/initiatives_awards/students_in_action/dartmouth.html (Date of use: 28 August 2018); Fowles *Public Higher Education Governance: An Empirical Examination* 7; Vasudev PM "Corporate Law and its efficiency: A Review of History" *AJLH* 2008 – 2010.; and Mitchell LE, Cunningham LA and Haas JJ *Corporate Finance and Governance: Cases, Materials and Problems for an Advanced Course in Corporations* (Carolina Academic Press 2006) 8 – 10 for a

the pre-1994 era, education was racially segregated in the USA. Until the middle of the twentieth century, higher education meant segregated education for the majority of black people in the USA.[340] In 1896, the Supreme Court decision of *Plessy v Ferguson*[341] confirmed that the "separate but equal"[342] practice was a reasonable solution for preventing the mixing of races.[343] From the establishment of the Cheney State College until 1954, black people in the USA were primarily educated in historically

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discussion of this case. The King of England granted a charter to the Dartmouth College during 1759, which stipulated the purpose of the school, how it would be governed and managed as well as giving land to the college.

[340] The first black college was established in 1817 in response to the discrimination that took place against black people before the civil war in the USA. The aim establishing this college was to provide black students with education in amongst other, liberal arts, which was similar to the education provided in predominantly white institutions (PWIs) See, generally, Kujovich G "Equal Opportunity in Higher Education and the Black Public College: The Era of Separate but Equal" 1987 (72) *Minnesota Law Review* 37; Tollett KS "Blacks, Higher Education and Integration" 1972(48) *Notre Dame Law* 195; Litolff EH *Higher education desegregation: An Analysis of State Efforts in Systems formerly Operating Segregated Systems of Higher Education* (Published DPhil thesis Louisiana State University 2007) 47 – 50; Penn EB and Gabbidon SL "Criminal Justice Education at Historically Black Colleges and Universities: Three decades of progress" 2007 (18) *Journal of Criminal Justice Education* 138.

[341] *Plessy v Ferguson* 136 US 537 (1896). Hereinafter referred to as the *Plessy v Ferguson matter*. See Hillstrom LC *Defining moments: Plessy v Ferguson* (Omnigraphics Inc 2014) 33 – 107 for a discussion of this case, the history leading up to the court decision as well as an overview of segregation; Groves HE "Separate but Equal: The Doctrine of Plessy v Ferguson" 1951 (12) *Phylon* (1940 – 1956) 66 – 72.

[342] The Fourteenth Amendment in the USA Constitution addresses many aspects of citizenship and the rights of citizens and it feature prominently in the matter of *Brown v Board of Education* 347 USA 483 (1954). For more information on the Fourteenth Amendment, see https://www.law.cornell.edu/constitution/amendmentxiv (Date of use: 28 August 2018); Ransmeier JS "The Fourteenth Amendment and the 'Separate but Equal' Doctrine" 1951 (50) *Michigan Law Review* 203 – 260.

[343] The interpretation of the "separate but equal rule" stems from the Fourteenth Amendment and means, "no state shall deny to any person within its jurisdiction the equal protection of law". Therefore, a state had the right to adopt a policy of segregation as long as it provided for substantial equal facilities for those segregated from the regular facilities. This decision resulted in separate railroad coaches for the races, separate waiting rooms in railroad and bus stations, dual systems of public education, separate water fountains in public buildings and the rear seat of the bus for black passengers. For more on the "separate but equal" doctrine, see Westin AF "Segregation and Discrimination in Higher Education" 1950 (10) *Lawyers Guild Review* 210; Beittel AD "Effects of the 'Separate but Equal' Doctrine of Education" 1951 (20) *The Journal of Negro Education* 140 – 147; Stefkovich JA and Leas T "A Legal History of Desegregation in Higher Education" 1994 (63) *Journal of Negro Education* 407 – 411; Muffler JP "Education and the Separate But Equal Doctrine" 1986 (17) *The Black Scholar* 35 – 41; Groves *Phylon* (1940 – 1956) 1951 (12) 66.

black colleges and universities. In the landmark decision in *Brown et al. v Board of Education of Topeka*[344], the Supreme Court declared it unconstitutional to have separate public schools for black and white people.[345] The *Brown* judgment struck down the precedent created in *Plessy v Ferguson* and racial discrimination was no longer allowed in schools.[346]

Before the Civil War,[347] black people in Georgia did not receive any formal education; in fact, it was illegal to teach slaves to read or write.[348] In 1867, the first college for black students, the Atlanta University, was founded in Georgia.[349] In *Hunt v Arnold*[350] three black women brought a class action

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[344] *Brown et al. v Board of Education of Topeka* 347 USA 483 (1954). See Sanders F "*Brown v Board of Education*: An Empirical reexamination of its effect on Federal District Courts" 1995 (29) Journal of the Law & Society Association Review 731 – 756; Klarman MJ *Brown v Board of Education and the Civil Rights Movement* (Oxford 2007); Litolff *Higher Education Desegregation: an Analysis of State Efforts in Systems formerly Operating Segregated Systems of Higher Education* 8 – 11.

[345] Penn and Gabbidon 2007 (18) *Journal of Criminal Justice Education* 139; Litolff *Higher Education Desegregation: An Analysis of State Efforts in Systems formerly Operating Segregated Systems of Higher Education* 1.

[346] See Loevy RD (ed) *The Civil Rights Act of 1964: The Passage of the Law that ended Racial Segregation* (State University of New York Press 1997) 1 – 364 for more on this Act.

[347] The Civil War took place between 1861 – 1865.

[348] 1829 Ga. Laws 171. See O'Brien M "Discriminatory Effects: Desegregation Litigation in Higher Education in Georgia" 1999 (8) *William & Mary Bill of Rights Journal* 7.

[349] The Morrill Act of 1862 provided funding for the establishment of state land grant colleges. In 1890, the Morrill Act of 1890 was passed. This Act which required all states to ensure that there was an equitable division of funds between white and black colleges in order for them to qualify for funding. Georgia was one of the states that remained segregated. The Board of Regents played a part in ensuring segregation in public higher education in Georgia. The Board of Regents would assist students who applied for access to a university or college to obtain scholarship at an out-of-state institution. When the student did not want to accept this placement, the Board of Regents would find other ways to exclude the student from admission to a public facility in Georgia. The Board of Regents adopted various policies preventing black students from enrolling at all-white schools. Even after the *Brown* decision, Georgia still resisted any attempt of desegregation, going as far as to promulgate legislation ensuring that no state funding would be availed to any institution that was racially integrated. See in general O'Brien 1999 (8) *William & Mary Bill of Rights Journal* 7. For a history of the establishment of black colleges in Georgia, see O'Brien 1999 (8) *William & Mary Bill of Rights Journal* 8 – 21. See para 5.5.2(b)(ii) below for a discussion of the Board of Regents of Georgia.

[350] *Hunt v Arnold* 172 F. Supp. 847 (N.D Ga 1959).

against the university system of Georgia after being denied access to the Georgia State College of Business Administration. They alleged that the college was acting unconstitutionally by segregating races and that the admission policy of the college was discriminatory. The court agreed with the applicants and found that the college was racially segregated, which contravened the applicants' Fourteenth Amendment rights.[351]

Desegregation in Georgia began in 1961 with the decision in *Holmes v Danner*[352] where the Federal Court ordered the University of Georgia to admit two black students. It was strengthened by the passing of the Civil Rights Act of 1964, which provided a federal agency with the power to monitor state compliance with the directive of the *Brown* decision. In the event of non-compliance, state funding would be denied. This Act also provided a financial incentive to institutions for voluntary compliance.[353]

(b) Regulation of higher education

Historically, American higher education has primarily been self-regulatory in respect of non-profit, private and public institutions.[354] The post-secondary education sector in the USA consists of colleges, universities, community colleges and for-profit and non-profit private institutions. The incorporating state's legislation determines the type of institution.[355] Most

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[351] *Hunt v Arnold* 172 F. Supp. 847 (N.D. Ga 1959) 856 – 857.

[352] *Holmes v Danner* 191 F. Supp. 394, 410 (M.D. Ga. 1961).

[353] O'Brien 1999 (8) *William & Mary Bill of Rights Journal* 22.

[354] Lahey JL and Griffith JC "Recent trends in Higher Education: Accountability, Efficiency, Technology and Governance" 2002 (52) *Journal of Legal Education* 528.

[355] US Department of Education "An Overview of US Higher Education Governance" 2005 24 – 27. For more on the post-secondary education in the USA, see https://www2.ed.gov/about/offices/list/ous/international/usnei/us/edlite-structure-us.html (Date of use: 28 august 2018); Eckel P and King J "An Overview of Higher Education in the United States" 2004 *American Council on Education* 1 – 18; National Institution for Academic Degrees and University Evaluation "Overview: Quality Assurance System in Higher Education – United States of America" 2010 6; Helms L

public and all private institutions in the USA are licensed or chartered as corporations. They are mostly self-governed in terms of academic affairs, administration, fund-raising, resource allocation and public relations.[356] The law applicable to higher education emerged from both federalism and the separation of powers. Legal issues pertaining to higher education in the USA may thus arise in courts, Congress, state legislature as well as local government legislative bodies.[357] The USA Constitution does not expressly provide for education, leaving its regulation to the states in terms of the Tenth Amendment of the USA Constitution.[358] The Constitution of each state addresses school and tertiary education in general and provides for the funding of higher education and the promulgation of relevant legislation. In the USA, there is a combination of both state and national control, and governing boards are appointed to lessen the extent of government intervention.[359] The Legislature of each state delegates the authority for policymaking and oversight of higher education institutions to external

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"Comparing Litigation in Higher Education: The United States and Australia 2007" 2009 *International Journal of Law & Education* 38.

[356] US Department of Education (DOE) "An Overview of US Higher Education Governance" 2005 27. The DOE is a federal department of education. It is the primary agency for the federal government and is responsible for implementing any legislation passed by Congress pertaining to education.

[357] Kaplin WA and Lee BA *The Law of Higher Education* 5th ed (Jossey-Bass 2014) 7.

[358] The states can create, organise, support and even dissolve public higher education institutions. See in general Urchick K *US Education Law: Is the Right to Education in the US in Compliance with International Human Rights?* (Published LLM thesis Michigan State University 2007). According to the Tenth Amendment, the powers not delegated to the USA Federal government by the Constitution nor excluded from state regulation are left up to each state, see https://www.law.cornell.edu/constitution/tenth_amendment (Date of use: 28 August 2018); Mangan MJ "The Tenth Amendment" 1962 (48) *Women Lawyers Journal* 20, 27; Segal BL "A Rational Basis for Tenth Amendment Federalism" 1984 (30) *Wayne Law Review* 1269 – 1308.

[359] Taylor JS and De Lources Machado M "Governing Boards in Public Higher Education Institutions: A Perspective from the United States" 2008 *Tertiary Education and Management* 246.

governing boards.[360] It is the responsibility of the state to ensure a balance between institutional autonomy and public accountability.

Institutional autonomy is not absolute.[361] Higher education governance is divided into two categories: internal governance, which refers to the structures, and processes by which an institution governs itself, and external governance, which concerns the structures and processes by which outside stakeholders are involved in the governance and affairs of institutions.[362] The so-called "external law" within higher education is created by both the federal and provincial governments. The federal government has limited powers, as the USA Constitution does not provide express powers with regard to higher education. However, through its express and implied powers, the federal government still exercises substantial authority over both public and private higher education institutions.[363] The US Department of Education is responsible for ensuring equal access to education and promoting educational excellence. The office of the Secretary of Education is responsible for the overall direction, supervision, and coordination of all activities of the Department and is the principal adviser to the President on Federal policies, programmes, enforcing federal legislation and activities related to education in the United States. The Deputy Secretary focuses on elementary and secondary education, while the Under-Secretary focuses on higher and adult

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[360] US Department of Education "An Overview of US Higher Education Governance" 2005 30. These boards are responsible for the management of higher education, similar to the Department of Higher Education and Training in South Africa.

[361] Toma JD "Expanding Peripheral Activities, Increasing Accountability Demands and Reconsidering Governance in US higher education" 2007 (26) *Higher Education Research and Development* 58.

[362] Kaplin and Lee *The Law of Higher Education* 19.

[363] Express powers for instance include the power to raise and spend funds as Congress provides various types of federal aid to most public and private institutions in the USA. Under its implied powers, Congress may establish conditions on how institutions may spend their funding and on how they must account for the expenditure. See Kaplin and Lee *The Law of Higher Education* 22 – 23.

education.[364] Currently, the Secretary of Education is planning a major overhaul of higher education in the US. Some of the intended changes include the introduction of the "borrower defence" rule, which provides that borrowers who allege that they were misled or defrauded by their institutions regarding the outcome of a higher education program and can prove that their institution knowingly made false statements[365] may be eligible to have their loans "forgiven." Secretary DeVos also plans to repeal the "gainful-employment rule" which seeks to punish programs whose graduates bear high student loans.[366] These plans of the Secretary of Education confirm that there some is federal involvement in higher education.

The federal Higher Education Act of 1965 provided federal aid programmes for institutions.[367] In 2008, the Act was reauthorised[368] as the Higher Education Opportunity Act of 2008.[369] The purpose of this Act was to

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[364] See in general, https://www2.ed.gov/about/offices/list/om/fs_po/osods/intro.html (Date of use: 27 November 2018); Jackson A "Betsy DeVos was just Confirmed as Education Secretary — here's what she will Control" 2017-02-07 *Business Insider*.

[365] According to reports, this rule will make it next to impossible for defrauded students to obtain relief, thereby saving the country money. See in general, Kreighbaum A "A More Restrictive Rule for Defrauded Borrowers" *Inside Higher Ed* (date published: 26 July 2018); Hansen C "Proposed Changes in Borrower-Defence Rules Would Make It Tougher for Defrauded Students to Get Debt Relief" *The Chronical of Higher Education* 2018-07-25.

[366] See in general. Kreighbaum A "Winners and Losers from DeVos Approach" *Inside Higher Ed* (published on 7 August 2018); Thomason A "DeVos Plans to Ax Gainful-Employment Rule, Which Targeted For-Profit Colleges" *The Chronical of Higher Education* 2018-08-27.

[367] Hegji A "The Higher Education Act (HEA): A Primer" 2014 CRS 1 – 45 http://www.higheredcompliance.org/resources/nps70-020614-12%20%284%29.pdf (Date of use: 28 August 2018).

[368] Reauthorisation means that the Act creates, extends or makes changes to a federal programme and specifies the amount of money the government may spent to undertake the programme. See Lacey A and Murray C "The Nuts and Bolts of Reauthorization" 2015 *Career Education Review* https://www.thompsoncoburn.com/docs/default-source/publication-documents/the-nuts-and-bolts-of-reauthorization.pdf?sfvrsn=0&sfvrsn=0 (Date of use: 27 November 2018).

[369] Lowry RC "Reauthorization of the Federal Higher Education Act and Accountability for Student Learning: The Dog that didn't Bark" 2009 (39) *Publius* 506 – 526.

provide opportunities for students with intellectual disabilities to obtain access to post-secondary education.[370] It is also important to take note of the role played by the Association of Governing Boards (AGB) for universities and colleges in the governance of higher education boards. The AGB was founded in 1921, and its membership represents about 1,300 boards, which comprise about 1,900 colleges and universities.[371] It advocates the importance of good governance in higher education in the USA.

The USA has a system of shared governance. This means that the governing boards of each institution share governance duties between the president of the institution and its academic structure.[372] The governing board members and officers like the president and executive management of the institution hold fiduciary responsibilities. Their fiduciary duties include duties of care, loyalty and obedience. These duties also require board members to make careful decisions, in good faith and the best interests of the institution. Decisions should also be consistent with the public or charitable mission of the institution, and there should not be any undue influence from any other party.[373] In 2015, the AGB issued a statement on the fiduciary duties of governing board members. This statement confirmed that according to statutory and common law, officers and board members of corporations, including non-profit corporations as

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[370] Lee SS "Overview of the Higher Education Opportunity Act Reauthorization" October 2009 Insight https://thinkcollege.net/sites/default/files/files/resources/higher%20education%20opportunity%20act%20overview.pdf (Date of use: 28 August 2018). Post-secondary education includes university or college education.

[371] See the Association of Governing Boards https://www.agb.org/about-agb (Date of use: 28 August 2018); not all of the boards in the USA are members of this institution.

[372] "Governing Boards" are similar to the Councils of universities in South Africa while the "President" is similar to the Vice-Chancellor or Rector in South Africa. The academic structures are similar to those of the Senate in South Africa.

[373] See the Association of Governing Boards "Fiduciary Duties" https://www.agb.org/briefs/fiduciary-duties (Date of use: 28 August 2018).

well as public bodies that operate as universities or colleges, stand in fiduciary relations with their institutions.[374]

The governance structures and processes of public and private institutions differ because they are created differently, have different objectives and missions and derive authority to operate from various sources.[375] In 1819 the distinctions between private and public institutions and the roles of governing boards for both private and public sectors were clarified in *Dartmouth College v Woodward*[376] Private universities in the USA are usually not-for-profit corporations, and in some instances, may be for-profit institutions.[377] The government has limited involvement in these institutions, which are deemed corporations and are governed accordingly. Therefore, all the legislation applicable to not-for-profit corporations as well as for-profit corporations applies to private universities in the USA, depending on their classification.[378] All private institutions are responsible for electing their own boards. [379]

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[374] See the statement on fiduciary duties of governing board members 1 – 11 https://www.agb.org/sites/default/files/u27174/statement_2015_fiduciary_duties.pdf (Date of use: 28 August 2018); Taylor and De Lourdes Machado 2008 (14) *Tertiary Education and Management* 246.

[375] Kaplin and Lee *The Law of Higher Education* 19. Private higher education is discussed in detail as the focus remains on public higher education.

[376] *Dartmouth College v Woodward* 17 US 518, 1819. In this matter, the King of England had granted a charter to Dartmouth College in 1769. This charter contained the purpose of the school, described its structure and stipulated how it would be governed. In 1816, the state legislature of New Hampshire passed laws that revised the charter; the change in law resulted in the College being changed from a private to a public college; it also changed the duties of the trustees. The existing trustees filed suit and alleged that the Legislator had violated the Constitution as the change of charter constituted a cancellation of a contract. The Court agreed with the College and it was changed back to a private college. See further Kezar A "Rethinking Public Higher Education Governing Boards Performance: Results of a National Study of Governing Boards in the United States" 2006 (77) *Journal of Higher Education* 1005.

[377] The focus of this thesis is, however, on public institutions.

[378] Information received from Prof Barbara Lee, co-author of *The Law of Higher Education* 5th ed (Jossey-Bass 2014) by way of an email dated 16 July 2016. See in general Lahey and Griffith 2002 (52) *Journal of Legal Education* 536; US Department of Education "Organisation of US Education: Tertiary Education" 2008; Muirhead PP "Government Relations with Private Institutions" 1974 *Higher Education Research Report* 27 – 36; Merrill HK "The Encroachment of the Federal Government into Private

(c) External governance of public higher education institutions

The combination of state, rather than federal control as well as the constitution of governing boards is intended to lessen the extent of government intervention in the affairs of public higher education institutions in the USA.[380] Each state confers the responsibility for external governance to its Board of Regents or a board of trustees as the governing board. Two types of boards are recognised, namely, consolidated governing boards and coordinating boards.[381] Consolidated governing boards provide for a more powerful form of governance than coordinating boards. Consolidated governing boards, on the other hand, are responsible for both the coordinating functions as well as the day-to-day management of institutions, which includes finances, granting of degrees, staff and property. They are, therefore, the sole entities charged with the control of public higher education institutions. On the other hand, coordinating boards, work alongside institutional governing boards and are created with specific powers. Their involvement in the governance of public individual institutions in that state is prohibited in terms of the statutory provisions of that specific state. Coordinating boards mainly focus on matters like credit transfer and programmatic duplication across institutions. It is left to each state to choose the type of governing board best suited to it, in accordance with its statutory provisions.[382]

Institutions of Higher Education" 1994 Brigham *Young University Education and Law Journal* 63 – 85.

[379] Eckel and King *American Council on Education* 11.

[380] Taylor and De Lourdes Machado 2008 (14) *Teritary Education and Management* 246.

[381] Fowles *Public Higher Education Governance: An empirical examination*5 25; Taylor and De Lourdes Machado 2008 (14) *Teritary Education and Management* 246; McGuinness AC "Models of Postsecondary Education Coordination and Governance in the States" 2003 Education Commission of the States https://www.legis.nd.gov/assembly/62-2011/docs/pdf/13.9245.01appendix.pdf (Date of use: 24 August 2018).

[382] See in general, Fowles *Public Higher Education Governance: An Empirical Examination* 26 – 27 for more on the choice of governing boards of the states. Also, see Millett JD "State Coordinating Boards and State-wide Governing Boards" 1975 *New Directions for Institutional Statute* 1 -10.

The legislature of each state delegates the authority for policymaking and oversight of higher education institutions to these governing boards.[383] The power granted to the boards varies from state to state. These boards act as a type of "buffer" between the institutions and the government.[384] The degree of state control varies from state to state. In some states, the governing boards oversee the institutions, prescribe funding levels, establishing accountability measures, drafting policies and approving new academic programmes.[385] In others, the state board only has an advisory capacity and therefore has little direct authority over the institutions.[386]

Public universities in Georgia are governed by the University System of Georgia (USG)'s Board of Regents, a constitutional body[387] appointed by the Governor of Georgia in terms of the Georgia Constitution,[388] and regulated in terms of the Georgia Code of 2017.[389] The Georgia Constitution grants the Board of Regents the exclusive right to govern, control and manage the USG.[390] Public universities are created as "units" of the Board of Regents and operate as juristic entities within the ambit of the Board of Regents. The Board of Regents has its own bylaws providing for its

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[383] US Department of Education "An Overview of US Higher Education Governance" 2005 30.

[384] Tandberg DA "The Conditioning Role of State Higher Education Governance Structures" 2013 (84*) Journal of Higher Education* 507, 510.

[385] Twenty-five states have consolidating boards – these include Georgia, Florida and Arizona. See Fowles *Public Higher Education Governance: An Empirical Examination* 25.

[386] Twenty-five states have coordinating boards – these include Texas, New Mexico and California. See Fowles *Public Higher Education Governance: An Empirical Examination* 25. See Eckel and King 2004 *American Council on Education* 3.

[387] Constituted in terms of article VIII, s IV of the Georgia Constitution.

[388] Article VIII; s IV of the Georgia Constitution.

[389] Title 20, Chapter 3 of the Georgia Code of 2017.

[390] Article VIII, s IV of the Georgia Constitution. Currently the system consists of thirty-five institutions of higher learning, a marine research institute and a central University System Office.

governance.[391] The Chancellor is appointed by the Board of Regents and serves as the USG's chief executive officer. The Chancellor oversees all matters pertaining to funding, administration and operation of public universities and colleges.[392]

Georgia has a consolidated governing board. The Georgia Board of Regents was created by the Reorganization Act of 1931, as part of a reorganisation of Georgia's state government.[394] For the first time, public higher education in Georgia was unified under a single governing and management authority.[395] The Georgia Constitution grants the Board of Regents the exclusive right to govern, control, and manage the University System of Georgia (USG) and all USG institutions.[396] The Governor appoints members of the Board of Regents for a term of seven years, and they may be reappointed for subsequent terms.[397] The members of the Board of Regents donate their time and expertise to serve the state. Their position is voluntary and without financial remuneration.[398] The Board elects

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[391] See the bylaws of the Board of Regents, http://www.usg.edu/regents/bylaws (Date of use: 28 August 2018).

[392] For more on the chancellor, see http://www.usg.edu/chancellor/ (Date of use: 28 August 2018). See further the Bylaws http://www.usg.edu/regents/bylaws for the duties of a chancellor.

[393] Taylor and De Lourdes Machado 2008 (14) *Teritary Education and Management* 255.

[394] In June 1934 an amendment to the Bankruptcy Act, providing for the reorganisation of corporations was signed into law. The amendment granted relief to failing organisations which were facing insolvency. See in general Montgomery WR "The Corporate Reorganizations Act: An Analysis of the provisions of the law" August 1934 *Corporate Reorganizations: A Monthly Magazine Devoted to the Law of Corporate Reorganizations, Railroad Reorganizations and Municipal Relief* 15-44.

[395] See the USG facts on https://www.usg.edu/news/usgfacts (Date of use: 25 August 2018).

[396] See the overview on https://www.usg.edu/policymanual/ (Date of use: 25 August 2018).

[397] The Governor is the Head of State.

[398] Other than a minimal *per diem* to cover meals and lodging on days, they meet. Today, the Board of Regents is composed of nineteen members, five of whom are appointed from the state-at-large, and one from each of the state's fourteen congressional districts, see https://www.usg.edu/news/usgfacts (Date of use: 25 August 2018).

a Chancellor who serves as its chief executive officer and the chief administrative officer of the USG. The Board of Regents oversees the public colleges and universities that comprise the USG and has oversight of the Georgia Archives and the Georgia Public Library.[399] The Board of Regents fulfils its obligations by implementing rules and policies for the governance of the USG.[400] All public higher education institutions in Georgia must comply with the Board of Regents' *Policy Manual*.[401] The Board of Regents prescribes the duties of the Chancellor, who reports to the Board on the prompt and effective execution of all resolutions, policies, procedures, rules and regulations of public higher institutions in the State of Georgia.[402] The objective of the Board of Regents' Office of Internal Audit is to "support the USG management in meeting its governance, risk management, compliance and internal control responsibilities while helping to improve organisational and operational effectiveness and efficiency".[403] The *Compliance and Ethics Programme* was established during 2007 at the request of the Chancellor of the USG.[404] The chief audit officer[405] was requested to create the programme, which was done in accordance with

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[399] See general information on the Board of Regents on http://www.usg.edu/regents/ (Date of use: 25 August 2018).

[400] Some of these policies include the Board of Regents *Policy Manual, Academic & Student Affairs Handbook, Building Project Manual, Business Procedure Manual, Continuing Education Guidelines, Copyright Policy, Ethics & Compliance Program, Human Resources Administrative Manual* and *Information Technology Handbook.* See in general https://www.usg.edu/policies/ (Date of use: 25 August 2018).

[401] See the *Policy Manual* on http://www.usg.edu/policymanual/ (Date of use: 25 August 2018). This *Policy Manual* regulates the universities and deals with officers of the Board of Regents, institutional governance, academic affairs, student affairs, public service, research, finance and business, personnel, facilities, information, records and publication, information technology and miscellaneous matters.

[402] Section 1 of the *Policy Manual.* The Chancellor fulfils a similar role to that of the South African Minister of Higher Education and Training.

[403] See in general https://www.usg.edu/audit/ (Date of use: 25 August 2018).

[404] This means that it is valid across all institutions.

[405] John Fuchko III, Vice Chancellor for Internal Audit & Compliance/Chief Audit Officer.

federal guidelines for these types of programmes.[406] The primary function of the programme is to "promote the highest standards of ethical and professional conduct within the USG and to ensure compliance with all applicable laws, regulations and policies; to coordinate and support USG institutional ethics and compliance functions; and to conduct compliance investigations and reviews as needed to discharge an effective compliance programme".[407] The *Compliance Board Policy* and the *USG's Ethics Policy* serve as the primary policy framework for the Compliance and Ethics Programme.[408]

(d) Institutional governance of public higher education institutions

The internal structures of institutions vary, based on their size and the degree programmes that the institutions offer.[409] Usually, lay boards of trustees govern the universities and colleges (institutional governing boards).[410] The size, structure and appointment of members of institutional

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[406] Information supplied by Mr. Fuchko by way of email dated 15 May 2015. There were many reasons for starting this programme; however, the main reason was ensuring ethical behaviour in compliance with relevant legislation. This programme is intended to assist the Board, the Chancellor and other members of the institutional management in the discharge of their compliance oversight responsibilities.

[407] See the University System of Georgia's Ethics and Compliance programme https://www.usg.edu/organizational_effectiveness/ethics_compliance (Date of use: 25 August 2018).

[408] See the Ethics and Compliance Charter on https://www.usg.edu/assets/organizational_effectiveness/documents/2018_USG_Compliance_and_Ethics_Charter.pdf (Date of use: 25 August 2018). The University Systems Offices' (USO) *Compliance and Ethics Programme* is responsible for directing the USG' Office Compliance function that oversees the management of the USO-specific compliance risks. The *Compliance and Ethics Programme* responsibilities include *inter alia* the following: develop and manage a USO compliance and ethics function to manage USO-specific compliance risks; advise the Board of Regents, the Chancellor and institution management on significant campus or USO compliance risks and provide action steps to mitigate significant compliance risks; coordinate and support USG institutional compliance functions; conduct compliance investigations and reviews as needed to discharge an effective compliance and ethics programme; and receive reports of alleged employees malfeasance and forward those reports, in consultation with the USG Chief Legal Office to the Attorney General's Office for investigation.

[409] Kaplin and Lee *The Law of Higher Education* 21.

[410] The term "lay board" refers to the fact that the members of the board are lay persons, meaning that they do not necessarily have any experience in the governance of

governing boards also vary. The board members of public institutions are in many cases, political appointments and are often selected by the Governor of the state where the institution is located.[411] In some states and at many community colleges, board members are chosen through a general election process.[412] The institutional governing board is the highest decision-making authority in the university. The governing board is the counterpart of the Council on South African public higher education institutions.[413] The decision-making authority in institutions is shared among various formal and informal groups, which participate in the decision-making in multiple matters affecting the institution. These groupings include the President of the institution, the student governing bodies, staff, academic structures, and so on.[414] Each board member is in a fiduciary relationship with the institution and must act in the best interest of the institution as well as with the necessary care and skill that is required.[415] The President of each institution is responsible for providing overall leadership to the institution, managing its finances and budget, developing and executing the institution's strategic plan and establishing systems of accountability and performance. In addition to the President, other senior administrators

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higher education. See Taylor and De Lourdes Machado 2008 (14) *Teritary Education and Management* 246.

[411] Taylor and De Lourdes Machado 2008 (14) *Teritary Education and Management* 247.

[412] For more on the election of public boards, see Taylor and De Lourdes Machado 2008 (14) *Teritary Education and Management* 247 – 248.

[413] Henard F and Mitterle A "Governance and Quality Guidelines in Higher Education" *OECD* 50. See Chapter 2, para 2.3.2(b.1) above for a discussion of the Council of a higher education institution in South Africa.

[414] Forrest JJF and Kinser K *Higher Education in the United States: An Encyclopedia* (ABC-CLIO 2002) 279; Association of Governing Boards (AGB) White Paper: "Shared Governance – Changing of the Times" 2017 https://www.agb.org/sites/default/files/report_2017_shared_governance.pdf (Date of use: 27 August 2018).

[415] Association of Governing Boards (AGB) "AGB Board of Directors Statement on the Fiduciary Duties of Governing Board Members" 2015 https://www.agb.org/statements/2015-07/agb-board-of-directors-statement-on-the-fiduciary-duties-of-governing-board (Date of use: 27 August 2018); Association of Governing Boards (AGB) "AGB Board of Director's Statement on Board Accountability" 2015 https://www.agb.org/sites/default/files/agb-statements/statement_2007_accountability_0.pdf (Date of use: 27 August 2018).

provide leadership in various divisions.[416] In addition to the fiduciary duties and the duties of care and skill, public institutional boards also have basic responsibilities which can be summarised as follows: to ensure that the institution has an updated mission statement which is aligned with public interests; participate in executing the executive strategic institutional plan and monitor its progress; ensure the institution's fiscal integrity; preserve and protect the assets of the institution; preserve and protect the institutional autonomy and academic freedom of the institution; ensure that institutional processes and policies are current; engage regularly with the institution's significant contingencies; ensure high levels of transparency and ethical behaviour, and periodically assess the board and board committee performance.[417] The structure and management of each public institution differ. Institutions have the freedom to establish their own institutional governance structures.

The Board of Regents provides for two important governing documents, namely the *Policy Manual*[418] and the *Business Procedures Manual*.[419] The Georgia Board of Regents provides for institutional governance of the

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[416] Taylor and De Lourdes Machado 2008 (14) *Teritary Education and Management* 246. For more on the role of the President, see Stoessel JW "Conceptualizing the Shared Governance Model in American Higher Education: Considering the Governing Board, President and Faculty" 2013 *Inquiries Journal* http://www.inquiriesjournal.com/articles/818/2/conceptualizing-the-shared-governance-model-in-american-higher-education-considering-the-governing-board-president-and-faculty (Date of use: 27 August 2018); Stoessel" 2016 *Inquiries Journal* http://www.inquiriesjournal.com/articles/1346/responsiveness-in-american-higher-education-the-evolution-of-institutional-governance-structures (Date of use: 27 August 2018); Forrest and Kinser *Higher Education in the United States: An Encyclopedia* 281- 282.

[417] This is not an all-encompassing list but serves to provide a general idea of the basic responsibilities of an institutional board. See Association of Governing Boards "Board Responsibilities" https://www.agb.org/briefs/board-responsibilities (Date of use: 27 August 2018) Forrest and Kinser *Higher Education in the United States: An Encyclopedia* 285.

[418] See the full *Policy Manual* on https://www.usg.edu/policymanual/ (Date of use: 27 August 2018).

[419] See the full *Business Procedure Manual* on https://www.usg.edu/business_procedures_manual/ (Date of use: 27 August 2018).

public universities in Georgia in its *Policy Manual.*[420] It also provides for academic,[421] student[422] and financial matters, including the signature of contracts, donations, travel, auditing and insurance.[423] The Board of Regents elects the Presidents of the USG public institutions for a term of one year, which can be extended until the Board either acts to reappoint the President for the remainder of a one-year term or chooses not to reappoint the President. The appointment of a President is made subject to the Board of Regents' policies. USG Presidents are not entitled to a written employment contract.[424] The Board also has the authority to remove the President of an institution for just cause, in which case the person removed would not be eligible for re-employment within the USG.[425] The President of a public higher education institution is the executive head of that institution and is the counterpart of the South African Vice-Chancellor or Rector. The President reports to the Chancellor of the Board of Regents, and he or she is responsible for the operation and management of the institution and the execution of all directives issued by the Board and the Chancellor.[426] The

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[420] See in general the *Policy Manual* https://www.usg.edu/policymanual/section2/ (Date of use: 27 August 2018) This section covers the election of the USG institution Presidents by the Board of Regents; the procedure to select institution Presidents; performance assessments of institution Presidents; presidential transitions; presidential authority and responsibilities; president's meetings; organisational structure and changes; and presidential compensation.

[421] Para 3 of the *Policy Manual* covers academic affairs at institutions, including general policy, faculties, curriculum, the calendar of academic activities, grading system, creation and termination of academic programs, the Regents' reading and writing skills requirements, degrees, academic advisement and academic textbooks.

[422] Para 4 of the *Policy Manual* covers student affairs at all institutions, including the general policy; undergraduate admissions; student residency; Regent's financial assistance; discipline of students; appeals, immunisations and the University System Student Advisory Council.

[423] Para 7 of the *Policy Manual* covers all aspects of financial and business activities at all institutions, including the general policy, the USG budget, tuition and fees, private donations to the USG and its institutions, fund management, travel, purchasing, insurance, contracts, auditing, miscellaneous, information security policy, the Board of Regents' retiree health benefit fund investment policy and identity theft.

[424] Para 2.1 of the *Policy Manual*.

[425] Para 2.5.3 of the *Policy Manual*.

[426] Para 2.6.1 of the *Policy Manual*.

President of each institution may delegate his or her authority and responsibilities in terms of the *Policy Manual* unless the Board of Regents provides otherwise.[427] Each institution is responsible for having a strategic plan in which institutional priorities are defined and through which each institution's mission is carried out in accordance with the strategic direction of the Board of Regents.[428]

The Board of Regents maintains sound control of institutions by means of its various managerial policies and procedures. However, public higher education institutions in Georgia retain high levels of institutional autonomy in comparison with those at public institutions in South Africa. For instance, although the Board has the authority to remove an institution's President, there is nothing in any of its policies that provides the Board of Regents with authority to intervene in the affairs of a public higher education institution. In South Africa, the Higher Education Act of 1997 is very prescriptive in this regard and provides the Minister with the power to appoint an administrator and dissolve its council.[429]

Each institution is responsible for appointing its academic governance body. Paragraph 3.2 of the Board of Regents *Policy Manual* refers to "faculties", which appear to be the counterpart of the South African faculties.[430] The Chancellor of the Board of Regents, the USG Office of Academic Affairs and the Presidents of each institution, together with their administrative officers and faculties, develop, adapt and administer the

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[427] Para 2.6.5 of the *Policy Manual*.

[428] In addition, each institution is responsible for having a formal process in place to assess institutional effectiveness and to ensure that the results of the assessments are used for institutional improvement. Each institution must assess at least the following: basic academic skills at entry, general education, degree programmes and academic and administrative support programmes. See para 2.9 of the Policy Manual.

[429] See Chapter 3, para 3.4.2 above for a discussion of ministerial interventions in South Africa.

[430] See in general, https://www.usg.edu/policymanual/section3/C337 (Date of use: 27 August 2018).

academic methods and procedures deemed by them to be most effective in promoting academic matters in each institution.[431] Proper functions by the academic structures include the following: prescribing the teaching capacity of each faculty member; determining the minimum and a maximum number of students per class, and defining the nature and form of academic records to be kept by each faculty.[432] Each institution is also responsible for maintaining accreditation by the Southern Association of Colleges and Schools Commission on Colleges.[433] In all the institutions, the faculty consists of the academic corps and administrative officers.[434] The Faculty Council, Senate, Assembly or any other academic structure at a USG institution is responsible for appointing a secretary who must keep a formal record of all meeting proceedings. All meetings held by these academic structures must comply with the Georgia Open Records Act[435] and the Georgia Open Meetings Act.[436] In addition, the USG Faculty Council (USGFC), which is similar to the South African Senate, must provide a voice on academic and educational matters.[437] The Board of Regents annually allocates funds to the USG institutions and is responsible for the approval of the budgets of the institutions.[438] The State Auditor performs a

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[431] See the University System of Georgia's academic programs on https://www.usg.edu/academic_programs/ (Date of use: 27 August 2018).

[432] Para 3.1 of the *Policy Manual.* See in general Babbitt, Franke and Lee 2015 *Journal of College and University Law* 94 – 109.

[433] Para 3.1 of the *Policy Manual.* See in general the website of the Southern Association of Colleges and Schools Commission on Colleges for information relating to accreditation; http://www.sacscoc.org/ (Date of use: 27 August 2018). In South Africa, accreditation is done through the Council of Higher Education (CHE).

[434] The Corps of Instruction consists of the following: full-time professors, associate professors, assistant professors, instructors, lecturers, senior lecturers, principal lecturers and teaching personnel and such other staff as approved by the board of each institution. See in general, para 3.2 of the *Policy Manual* for more information about the faculties.

[435] Title 50-18-70 of the Georgia Code of 2017.

[436] Title 50-14-1 of the Georgia Code of 2017.

[437] See in general para 3.2.3.1 of the *Policy Manual* for more on the USGFC.

[438] Para 7.11 of the *Policy Manual.*

financial statement audit of each USG institution.[439] The director of internal audit at each institution reports directly to the President of that institution. The President of each institution must determine the organisational and operating reporting relationships of the internal auditors at his or her institution and must exercise oversight of institutional risk management as defined in section 7.15 of the *Policy Manual*.[440]

Primarily, the *Business Procedure Manual* sets forth the essential procedural components that each institution within the USG must follow to meet both the Board of Regents' policy mandates and the statutory or regulatory requirements of the state of Georgia and the federal government. The *Business Procedure Manual* provides professionals with the necessary information and tools to perform more effectively. Moreover, the *Manual* serves as a useful reference document for seasoned professionals at USG colleges and universities who need to remain current with changes in the Board of Regents' policy and state law. The USG's accounting policies conform to the Generally Accepted Accounting Principles (GAAP) in the USA, which applies to all public higher education institutions in Georgia.[441]

(e) Misconduct in the higher education sector

Despite the measures in place to combat misconduct and corruption in higher education in the USA, there are still frequent reports on education corruption and wrongful conduct in higher education institutions in the USA.[442] In one of these instances, the former president of Morris Brown

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[439] See para 7.10.1 of the *Policy Manual* for more on state audits; http://www.audits.ga.gov/ (Date of use: 27 August 2018).

[440] Para 7.10.2 of the *Policy Manual*.

[441] See in general para 1 of the *Business Procedure Manual* with regards to the accounting standards and compliance.

[442] Johnson VR "Higher Education, Corruption and Reform" 2012 (4) *Contemporary Readings in Law and Social Justice* 480.

College in Atlanta, Georgia, pleaded guilty to embezzling $3.4 million of federal money earmarked for student funding.[443]

The *Business Procedure Manual* provides for the investigation of malfeasance at institutions by the Board of Regents. The USG Office of Internal Audit and Compliance has the primary obligation of investigating reported malfeasance involving the University System Office.[444] Incidents involving suspected malfeasance by an employee must be reported to the USG Director of Ethics and Compliance once an initial determination has been made that employee malfeasance may have occurred.[445] Except for the investigation of malfeasance at institutions, neither the *Business Procedure Manual* nor the *Policy Manual* provides for any other specific investigations by the Board of Regents into the affairs of institutions. The Board of Regents can intervene when requested to do so by an institution, or when any mismanagement comes to its attention, which, in the opinion of the Board of Regents, requires intervention. This is very different from the way in which the DHET deals with investigations pertaining to public institutions in South Africa.[446]

The investigation in 2012 into the affairs of one of the higher education institutions, the Georgia Perimeter College (GPC), serves as an example.[447]

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[443] Johnson 2012 (4) *Contemporary Readings in Law and Social Justice* 480 and Romano L "College's ex-President Pleads Guilty of Fraud" May 2006 *Washington Post*

[444] Malfeasance implies any conduct or act carried out by a public official that cannot be legally justified or conflicts with the law including, but not limited to, fraud, waste and abuse. See s 16.4.4 of the *Business Procedure Manual*; https://www.usg.edu/business procedures manual/section16/C1526 (Date of use: 27 August 2018).

[445] Para 16.4.5. See https://www.usg.edu/business procedures manual/section16/C1526 (Date of use: 27 August 2018).

[446] See Chapter 3, para 3.4 above for a full discussion of the interventions by the DHET into the affairs of higher education institutions in South Africa.

[447] The objectives of the investigation were to offer an opinion on the effectiveness and accuracy of internal communications on the budgeting process, financial transactions and management decisions regarding the same and offer an opinion on the internal controls for budgeting and financial reporting with a focus on areas where weaknesses may have existed in processes to allow for unauthorised or fraudulent expenditures,

This investigation was mandated after the GPC faced an unprecedented fiscal shortfall in April 2012, of which the former President of the GPC notified the USG. During the investigation it was found that senior GPC administrators had failed to perform certain key fiduciary duties;[448] the GPC's spending had exceeded its revenue each year since 2009; ongoing use of reserves to meet operational costs was not sustainable; each member of the GPC's former fiscal leadership team claimed to have been unaware of the GPC's fiscal condition, and effective execution of assigned duties would have allowed the GPC's former fiscal leadership team to be aware of and subsequently to manage the GPC's fiscal affairs and budget effectively. It was clear from the financial reports that the spending exceeded revenue, reserves were being reduced, and cash was dwindling. The GPC's Chief Business Officer (CBO) had not provided the GPC's President with timely and reliable financial information for the President's use in managing the institution. However, it was also apparent that the President had not performed the necessary financial due diligence associated with his responsibilities as president of the institution nor had the CBO performed his assigned duties in good faith.[449] The CBO indicated that he had not reviewed the GPC's financial statements and that he had relied on the Budget Director to bring budget or fiscal problems to his attention. In summary, the Board of Regents declared that the GPC's fiscal problems would have been preventable if the relevant management team had exercised its duties with the care expected of them.[450]

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recording and reporting. This information was outlined in an engagement letter dated 10 May 2012, provided to me by the Board of Regents.

[448] Among these fiduciary duties was the responsibility for understanding and managing the institution's fiscal affairs.

[449] According to the job description, the CBO is the "chief financial officer of the college, responsible to the president for providing leadership and ensuring integrity, stability and excellence in the fiscal and administrative operations of the institution."

[450] This information was provided by the Board of Regents during an interview in July 2015. Another example of such an investigation was the Board of Regents' 2013 investigation into the conduct of the Georgia Regents University (GRU) (Official report dated 14 May 2013 1 – 7, 8). According to the Board of Regents, there had been a lack of awareness of relevant board policy and regulations, and board policy had been violated in respect of the misuse of university resources and staff at the President of

It is clear that the Board of Regents takes investigations seriously, and that it takes swift action to investigate any mismanagement or problems prevalent in higher education institutions. However, its investigations are conducted and recommendations made in such a manner that it does not threaten the institutional autonomy of higher education institutions, unlike the rather intrusive way in which the DHET conducts its investigations in South Africa including the DHET's power to take control of the university's affairs by appointing an administrator and dissolving its Council.

5.5.2 HIGHER EDUCATION IN CANADA

(a) Historical overview of the higher education system

The first permanent European colonial settlement in Canada was Quebec, founded by Champlain in 1608. The early education initiatives focused on "civilising" aboriginal people through schooling and religious conversion.

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the GRU's home. The objectives of the investigation were to determine the facts and circumstances pertaining to the use of institutional resources and personnel connected with a family wedding held at the President's residence on 20 April 2012; determine whether said use had been consistent with applicable policies, procedures and other standards governing USG employees and the use of state resources; address other issues that might arise during the course of the review; and provide recommendations as appropriate to address any violations, control weaknesses or other issues as may be noted during the engagement. Following this investigation, the Board of Regents made the following recommendations: that the university implement a comprehensive effort to train its senior administrators on the requirements associated with Board Policy and USG procedure; enhance coordination efforts among senior administrators; ensure their use of the GRU resources are consistent with Board Policy and state regulations. It was found that the use of a GRU-owned bus for a private event at the President's residence had violated Board Policy, since it transpired that, the GRU senior administrators had authorised the use of a GRU-owned bus to transport guests for a private event held at the GRU President's residence). The use of GRU personnel to work at the event had contravened the Board Policy (seven GRU personnel had provided various services at the private event). Furthermore, the GRU had not obtained the required approvals for improvements made to the GRU President's home. Subsequent to the release of the report, the institution has either already implemented some of these recommendations or was in the progress of implementing corrective action to address all the issues raised in the report. The time frames in which the investigation was done, and the subsequent implementation of the recommendations were impressively rapid, especially when taking into consideration that an administration process in terms of the Higher Education Act of 1997 for a university in South Africa can take two years or longer. The Final Report based on this investigation was provided to the author by the Board of Regents for the purposes of this research.

The Roman Catholic Church assumed responsibility for education during the French colonial period. The Jesuits founded the first secondary school in 1635 while the College de Quebec was the only higher education institution until 1760.[451] The American Revolution had an essential influence on higher education in Canada during the British colonial period. The colonial legislature created the first colleges. In 1789, the first college was founded in Windsor, Nova Scotia, and this was followed by the college of New Brunswick in Fredericton in 1800. In 1821, McGill College was established, and King's College in York[452] was awarded a charter from the British Crown in 1827.[453] It was clear from the outset that the provinces had different approaches when it came to higher education.[454] Higher education in eastern Canada involved a diversity of institutional types including public, private, secular and denominated institutions. The British North America (BNA) Act of 1867 played an important part in the regulation of higher education in Canada. The Act created the state of Canada, and it prescribed a federal government. The responsibility for education was assigned to the provinces.[455] The need to review higher education

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[451] Jones GA *Governments, Governance and Canadian Universities* (Higher Education: Handbook on Theory and Research 1996) 338; Forest JJF and Altbach P *International Handbook of Higher Education* (Spring 2011) 629.

[452] York later became Toronto. King's College at York later became the University of Toronto during 1849.

[453] Jones *Governments, Governance and Canadian Universities* 339.

[454] For instance, the Roman Catholic Church played a major role in education in general in Quebec, while Ontario only provided government financial support to secular universities.

[455] The relationship between these institutions and the government was limited and ambiguous. More public universities began to emerge over time and institutions all struggled with the relationship between universities and government and the appropriate governance structure for a university. From time to time provincial governments found themselves involved in disputes between denominational institutions and the governments found it hard to determine their role in the affairs of publically funded universities. See Jones G "An Introduction to Higher Education in Canada" (2014) *Higher Education Across Nations* 4. Forest and Altbach *International Handbook of Higher Education* 632 According to Locke, institutions struggled with the issues of the relationship between the government and the universities and what the appropriate university governance structure for a public institution was. Locke W, Cummings WK and Fisher D (eds) *Changing Governance and Management in Higher Education: The Perspectives of the Academy* (Springer 2011) 630 – 632.

governance came about when political leaders in the Ontario government were accused of interfering with the governance of the University of Toronto. The Ontario government attempted to address these issues by creating a *Royal Commission on the University of Toronto and University College* in 1906, with the mandate to review the relationship between the government and university governance.[456] The Commission recommended a structural solution in its report entitled *Report of the Royal Commission on the University of Toronto*.[457] First, it was proposed that the provincial government delegate its authority over the university to a board.[458] The second concept recommended by the Commission was bicameralism.[459] The Commission's final report included the proposed University of Toronto

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[456] This commission was referred to as the Flavelle Commission. Premier Whitney announced the creation of the Royal Commission and the membership was drawn from the education, political and business elite of Toronto. Joseph Flavelle was appointed as chair of the commission. This report became one of the most important documents in the history of Canadian higher education. See Shanahan, Nilson and Broshko *Handbook of Canadian Higher Education* 65; Jones GA, Shanahan T and Goyan P "The Academic Senate and University Governance in Canada" (2004) *CJHE* 38; Boggs AM *Ontario's Royal Commission on the University of Toronto, 1905 – 06: Political and Historical Factors that Influenced the Final Report of the Flavelle Commission* (Published MA thesis University of Toronto 2007) 32.

[457] The Legislative Assembly of Ontario 1906.

[458] *Report of the Royal Commission on the University of Toronto* xii – xxiii.

[459] The Commission recommended that the Board oversee the administrative affairs of the University of Toronto and that the Senate oversee the academic affairs. The representatives of the Senate would include representatives of the colleges, administration, graduates and each faculty would be responsible for such academic matters such as the conditions for granting of degrees. According to this system, the Board and the Senate share the accountability. South Africa also has a bicameral system in the form of Council and Senate. See Jones *Governments, Governance and Canadian Universities* 345

Act of 1971.[460] The University of Toronto Act set the example for other institutions in Canada for university funding and university state relations.[461]

By the 1950s, bicameralism was the dominant governance model in Canadian universities. However, during the 1960s, there were calls for higher faculty and student participation in university governance, which in turn led to essential governance reforms for Canadian universities. The Association of Universities and Colleges of Canada and the Canadian Association of University Teachers jointly sponsored a national review of university governance. Consequently, the Duff-Berdahl Commission was appointed in 1966 to address the various issues raised by stakeholders. This commission received dozens of submissions and undertook a national research tour. The government amended most of the universities' charters in response to various recommendations from the universities. These reforms took the form of changes to the composition of the board as well as of the Senate.[462]

(b) Current regulation of higher education.

Higher education governance in Canada is decentralised, with federal and provincial levels of governance. There is, however, no federal Minister of

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[460] *Report of the Royal Commission on the University of Toronto* 238 – 243. See in general Amaral A, Jones GA and Karseth B *Governing Higher Education: National Perspectives on Institutional Governance* (Kluwer Academic Publishers 2002) 216. Subsequently, the University of Toronto abandoned bicameralism in favour a single governing council that excluded both external and internal constituencies. This is discussed more fully below. Boggs *Ontario's Royal Commission on the University of Toronto, 1905 – 06: Political and Historical Factors that Influenced the Final Report of the Flavelle Commission* 35.

[461] Boggs *Ontario's Royal Commission on the University of Toronto, 1905 – 06: Political and Historical Factors that Influenced the Final Report of the Flavelle Commission* 4.

[462] Shanahan, Nilson and Broshko *Handbook of Canadian Higher Education* 65; Jones GA, Shanahan T and Goyan P "University Governance in Canadian Higher Education" 2001 *Tertiary Education & Management* 137 - 141.

Education.[463] The framework for university governance in Canada is extremely complex. There is a significant amount of legislation involved, from the Constitution Act of 1867, the Canadian Charter of Rights and Freedom, the provincial acts or charters incorporating universities, as well as provincial not-for-profit corporations' legislation.[464] Each university is granted specific powers by its incorporating Act.[465] Depending on the jurisdiction in which the university is incorporated, it may also be subject to applicable provincial not-for-profit legislation.[466] It seems Canadian universities enjoy high levels of institutional autonomy compared to higher education institutions in South Africa. This is also the opinion of the Task Force on University Accountability.[467]

An international comparison indicates that Canadian public higher education institutions have the lowest level of government involvement.[468]

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[463] Shanahan, Nilson and Broshko *Handbook of Canadian Higher Education* 9 – 10; Waddington D "Challenges of Canada's Decentralized Education System" 2018 *College Quarterly* http://collegequarterly.ca/2018-vol21-num02-spring/challenges-of-canadas-decentralized-education-system.html (Date of use: 28 August 2018); Jones 2014 *Higher Education Across Nations* 1; Locke *et al.* (eds) *Changing Governance and Management in Higher Education: The Perspectives of the Academy* 53.

[464] Shanahan, Nilson and Broshko *Handbook of Canadian Higher Education* 59.

[465] In some provinces like Alberta, universities are established and governed by a single Act, similar to the position in South Africa. In Alberta, the Post-Secondary Learning Act of 2004 governs higher education. In Ontario, universities are established and governed by their own incorporating acts, like the University of Toronto Act of 1971 and the York University Act of 1956.

[466] Shanahan, Nilson and Broshko *The Handbook of Canadian Higher Education Law* 59; Locke *et al.* (eds) *Changing Governance and Management in Higher Education: The Perspectives of the Academy* 154. In Ontario, the Business Corporations Act is currently applicable, but will soon be replaced by the Not-For-Profit Corporations Act.

[467] Ministry of Education and Training "University Accountability: A Strengthened Framework" 1993 *Report of the Task Force on University Accountability* 32.

[468] The degree of independence from government, whilst substantial, is influenced by conditions and expectations from the government in relation to the provision of funding. This means that whilst each university may pursue its mission, it must do so within the context of post-secondary education policies. Information supplied by Mr Barry McCartan from the Ministry of Training, Colleges and Universities. See Locke, Cummings and Fisher (eds) *Changing Governance and Management in Higher Education: The Perspectives of the Academy* 632; Anderson D and Johnson R "University autonomy in twenty countries" 1998 *Centre for Continued Education, the Australian National University* 17; Amaral, Jones and Karseth *Governing Higher*

The Constitution Act gives exclusive authority to each province in Canada to make laws concerning education. Higher education in Canada is primarily dealt with on a provincial level, and each province has mechanisms in place for coordinating and regulating higher education. In Ontario, incorporating statutes specific to that institution establish most universities. They are autonomous not-for-profit corporations.[469] These corporations do not have shareholders, and they are subject to different tax and reporting arrangements than for-profit corporations.[470] The incorporating acts determine the powers of the university in financial and academic matters and provide for the governance structure and composition, including whether government appoints any members to the board and the number of people elected from other consistencies like students, faculty and alumni.[471] These universities have significant independence to enable them to pursue their mission within the context of government postsecondary education policies. It is required that the internal governance processes of universities be transparent and conducted democratically.[472] The Ministry of Training, Colleges and Universities confirmed during an interview that the Ontario government expects publicly assisted universities to be accountable to the government

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Education: National Perspectives on Institutional Governance 217; Jones G *et al.* "Provincial Oversight and University Autonomy in Canada*:* Findings of a Comparative Study of Canadian University Governance" 2017 draft paper accepted for publication in the *Canadian Journal of Higher Education*.

[469] Jones, Shanahan and Goyan 2001 *Tertiary Education and Management* 136; Locke, Cummings and Fisher (eds) *Changing Governance and Management in Higher Education: The Perspectives of the Academy* 154.

[470] They are, however, a juristic entity, which can hire employees, enter into contracts, sue and be sued as well as own property. See Locke *et al.* (eds) *Changing Governance and Management in Higher Education: The Perspectives of the Academy* 154.

[471] Amaral, Jones and Karseth *Governing Higher Education: National Perspectives on Institutional Governance* 215.

[472] Information supplied by Mr Barry McCartan, Director in Post-Secondary Education in the Ministry of Training, Colleges and Universities, Ontario after an interview at the Ministry's offices on 28 June 2016.

on how they are spending the funding received.[473] It is also expected of universities to be transparent in their internal governance processes.[474]

(i) Public and private higher education

There are some differences between the regulation of public and private higher education in Canada and the USA. In Canada, there are only a few private higher education institutions, while in the USA, almost half of the higher education institutions are private. Most universities in Canada are public since they are partially funded by the government.[475] There are three types of higher education institution in Canada, namely, institutes, colleges and universities.[476] As mentioned above, universities are not-for-profit corporations, charities or both. The incorporating statute of each institution provides for both substantive and procedural autonomy of the governing bodies of institutions to act in the best interest of the university. Most universities in Ontario have a predominantly bicameral system of governance, with the exceptions of the University of Toronto and University of Ontario Institute of Technology, where bicameralism was abandoned in favour of a unicameral structure.[477]

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[473] Interview took place on 28 June 2016 with Mr Barry McCartan from the Ministry of Training, Colleges and Universities.

[474] Confirmed during the interview with Mr McCartan on 28 June 2016.

[475] Each publically assisted university, except for Queens University and Université de Hearst, is established or continued by an individual act of the Ontario Legislature as a private corporation. These acts were originally enacted or amended at different time periods, generally when a university was established or when significant changes was affected. Separate acts exist for some affiliated and federated universities and denominational colleges (information supplied by Mr. Barry McCartan from the Ministry after a visit to the Ministry offices on 28 June 2016).

[476] Locke, Cummings and Fisher *Changing Governance and Management in Higher Education: The Perspectives of the Academy* 155 - 157.

[477] Jones, Shanahan and Goyan (2004) *CJHE* 39. A unicameral structure involves only one governing body instead of two. For the purposes of this thesis the governance documents of the University of Toronto and Ryerson University are considered. One regulates a unicameral and one a bicameral governance structure. It is clearly not possible to discuss the governance documents of all 22 public universities, but these two examples provide an overview of the type of governance documents and policies in place for public universities in Ontario. In 1971, the University of Toronto requested

A private institution generally does not receive funding from the provincial, territorial or federal governments, but instead receives private funding through alumni donations, faculty research grants and tuition fees.[478] Private higher education institutions can be incorporated as not-for-profit corporations and/or charities or for-profit corporations.[479] These institutions are established for the purpose of distributing profits to individual directors, employees, owners or shareholders.[480] Private institutions[481] may not receive grants or funding from the government, but their students remain eligible for financial assistance under provincial government programmes.[482] The institutional governance structures for private and public institutions are very similar. In Canada, similarly to South Africa, a higher education institution may only award degrees or refer to itself as a university if legislation provides it with this right.[483]

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that the Legislature provide for a unicameral governing body with jurisdiction over both financial and academic matters. By 1988, its Governing Council had delegated its authority on financial matters to a Business Board and its authority on academic matters to an Academic Board. The University of Ontario Institute Of Technology followed a similar strategy by providing its Academic Council with authority on academic matters. (Information supplied by Mr. Barry McCartan from the Ministry during an interview with him at the Ministry on 28 June 2016).

[478] The research for this thesis focuses mainly on public universities in Ontario.

[479] Joshi JM and Paivandi S *Private Higher Education: A Global Perspective* (BR Publishing Corporation 2015) 14; Shanahan, Nilson and Broshko *The Handbook of Canadian Higher Education Law* 43.

[480] See types of higher education institutions in Canada https://www.universityguideonline.org/en/InternationalPathways/types-of-institutions-in-canada (Date of use: 16 March 2016).

[481] Currently, there are approximately 19 private universities located in five provinces. Unlike public institutions, the vast majority of private degree-granting institutions charge the same tuition fees for both domestic and international students and in most cases, the fees are the same regardless of the undergraduate degree programme: https://www.universityguideonline.org/en/InternationalPathways/types-of-institutions-in-canada (Date of use: 29 August 2018). See Joshi and Paivandi *Private Higher Education: A Global Perspective* 15.

[482] Shanahan, Nilson and Broshko *The Handbook of Canadian Higher Education Law* 43.

[483] Skolnik and Jones 1992 (63) *The Journal of Higher Education* 127.

(ii) External governance of public higher education institutions

The federal government plays no direct role in higher education. Each province is responsible for regulating higher education. The federal government's role is limited to contributing funds to the provincial ministry responsible for education.[484] The Ministry of Training, Colleges and Universities is responsible for higher education institutions in Ontario, Canada. This was established by the Ministry of Training, Colleges and Universities Act.[485] However, the Ministry and higher education institutions operate at arm's length from one another. In Ontario, the Ministry of Training, Colleges and Universities is responsible for the administration of laws relating to education and skills training.[486] It is also responsible for post-secondary education by developing policy directions for universities and colleges of applied arts and technology; planning and administering policies relate to basic and applied research in this sector; authorising universities to grant degrees; distributing funds allocated by the provincial legislature to colleges and universities; providing financial assistance programmes for post-secondary school students, and registering private career colleges.[487]

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[484] Through the Canada Student Loans Programme, which is administrated in collaboration with the provinces, the federal government has also been playing an important role in providing financial assistance to students since 1964. See Shanahan, Nilson and Broshko *The Handbook of Canadian Higher Education Law* 26 - 28.

[485] In accordance with the Ministry of Training, Colleges and Universities Act R.S.O. 1990 c. M. 19.

[486] The following acts are relevant to the administration of education in Ontario: Ministry of Training, Colleges and Universities Act R.S.O. 1990 c.M 19; Colleges Collective Bargaining Act R.S.O. 1990 c.C 15; Higher Education Quality Council Act 2005 S.O. c.28; Ontario College of Art & Design Act 2002 S.O. c.8; Ontario College of Applied arts and Technology Act 2002 S.O. c.8; Ontario College of Trades and Apprenticeship Act 2009 S.O c.22; Post-secondary Education Choice and Excellence Act 2000 S.O. c.36; Private Career Colleges Act R.S.O. 1990 c.U.3; University Expropriation Powers Act R.S.O. 1990 c.U.3; University Foundations Act 1992 S.O. c.22; University of Ontario Institute of Technology Act 2002 S.O. c.8. https://www.ontario.ca/page/ministry-training-colleges-universities (Date of use: 28 August 2018).

[487] See more information on the Ministry of Training, Colleges and Universities https://www.ontario.ca/page/ministry-training-colleges-universities (Date of use: 24 January 2019).

The Ministry enters into strategic mandate agreements with each public university and each college of arts and technology.[488] These agreements outline the role of each institution in the post-secondary system and indicate how the institution aims to achieve its system-wide objectives.[489] The Ministry exerts significant influence over university decision-making through its policies and procedures that govern the provision of public funding. Universities are accountable for the expenditure of public funding in a number of ways and various policies regulating funding provides for ongoing operational as well as capital and research funding.[490] All public universities are also subject to the Ontario Corporations Act in addition to their own incorporating statutes.[491] These incorporating statutes provide that they will prevail in the event of a discrepancy between the two statutes.[492]

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[488] In these agreements, the Ministry acknowledges the University's autonomy and the University acknowledges the role of the Ministry as the Province's steward of Ontario's post-secondary education system.

[489] These objectives are supported by specific metrics which are intended to measure outcomes in a variety of areas, such as measures of jobs, innovation and the economy, teaching and learning, size and composition of the student body, research and graduate education, programme offerings and collaboration to support student mobility (iinformation supplied by Mr. Barry McCartan from the Ministry). The agreements are published on the Ministry's website and are available to the public, which enhances transparency. See https://www.ontario.ca/page/all-college-and-university-strategic-mandate-agreements (Date of use: 27 August 2018). These agreements contain the following: university's key areas of differentiation; alignment with the differentiation policy framework; teaching and learning; student population; research and graduate education; programme offerings; institutional collaboration to support student mobility; aspirations; enrolment growth; graduate allocation; financial sustainability; and ministry/government commitments.

[490] One of these policies is the student fee policy that determines student fees (information supplied by Mr. Barry McCartan from the Ministry during an interview on 28 June 2016). The Ministry also has significant influence over how much tuition fees may be charged by universities through means such as setting a tuition fee policy or framework as well as the design and funding of student assistance programmes and as a condition of enrolment in a university programme being taken into account when distributing annual operating funds.

[491] The Ontario Corporations Act is discussed in para 5.3.2(c) above.

[492] The incorporating acts are discussed in para 5.5.2(b) above.

Public universities are subject to audits by the Ontario Auditor General[493] while the Ontario Ombudsman[494] has investigative authority with respect to certain types of complaints received about universities. Provincial governments may require universities to have certain internal quality assurance structures to ensure high-quality degree programmes. However, universities still operate independently and control their own academic, admissions and standards policies as well as degree requirements, programme offerings and staff appointments.[495] The Ministry in Ontario has no formal reporting requirements for public universities other than filing their annual audited financial reports with the Ministry. By contrast, in South Africa, universities are subject to various reporting requirements in terms of the *2014 Reporting Regulations* as well as statutory provision for ministerial interventions.[496]

(iii) Institutional governance of public higher education institutions

The arrangements regarding the structure, function, programming and governance among provincial governments and Canadian colleges vary from province to province.[497] In Ontario, there are twenty-two public

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[493] For more information on the Auditor General, see http://www.auditor.on.ca/ (Date of use: 27 August 2018). The Office of the Auditor General of Ontario is an independent office of the Legislative Assembly that conducts value-for-money and financial audits of the provincial government, its ministries and agencies. It also audits organisations in the broader public sector that receive provincial funding, such as hospitals and long-term care homes, universities, colleges and school boards.

[494]For more information on the Ombudsman, see https://www.ombudsman.on.ca/Home.aspx (Date of use: 27 August 2018). The Ombudsman is an independent officer of the Legislature who investigates complaints from the public about Ontario government services, recommending improvements for governance and resolving individual issues. The Ombudsman has a process for laying complaints, which can be found on https://www.ombudsman.on.ca/About-Us/Who-We-Oversee/Universities.aspx (Date of use: 27 August 2018).

[495] Shanahan, Nilson and Broshko *The Handbook of Canadian Higher Education Law* 46.

[496] See Chapter 4, para 4.4.4 above.

[497] Shanahan, Nilson and Broshko *The Handbook of Canadian Higher Education Law* 2016 46.

universities,[498] each incorporated under its own statute or charter. These statutes govern universities in Ontario and assign responsibility to at least three decision-making authorities within the universities. The management structures of universities in Canada are similar to those in South Africa: their governing board is similar to the South African Council, and both jurisdictions provide for an academic Senate. The governing statute of each university prescribes the relevant management structures, and there are, therefore, differences between the management structures at various universities and their naming conventions.[499] Jones indicates that the majority of board members are lay members. There are also student members as well as faculty and alumni representatives on the governing board. The average size of a university governing board, according to Jones, is twenty-seven members while the average size of the academic senate is fifty-eight members.[500]

The governing statutes assign to the university board the authority over the conduct, management and control of the property, revenue, expenditure, business and affairs of the university.[501] A division of authority exists between the board and the Senate, as detailed in each statute.[502] The Senate is responsible for all academic matters while the third decision-making authority is the central academic administration. Each incorporating

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[498] For more information on universities in Ontario, see https://www.ontario.ca/page/ontario-universities (Date of use: 27 August 2018).

[499] Jones GA and Skolnik ML "Governing Boards in Canadian Universities: Characteristics, Role, Function, Accountability and Representatives" 1995 *Paper presented at the Annual Meeting of the Association for the Study of Higher Education* 5.

[500] Jones, Shanahan & Goyan 2001 *Tertiary Education and Management* 141.

[501] Board members are not remunerated for their services, although no incorporating act prohibits this (information supplied by Mr Barry McCartan from the Ministry resulting from an interview with him on 28 June 2016).

[502] Boards and Senates coordinate actions in many areas. If the Senate decides to create a new programme, for instance, the board must agree to approve funding (information supplied by Mr Barry McCartan from the Ministry based on an interview with him on 28 June 2016). See Jones and Skolnik 1995 *Paper presented at the Annual Meeting of the Association for the Study of Higher Education*

act provides for the composition of the governing body. The appointments to the board are as follows: the government appoints one-quarter of the members to the board; one quarter is elected by a constituency and one quarter is appointed by the board itself. The remaining members are ex officio, appointed by some other organisation or by the Senate.[503] This is similar to the provisions of section 27 of the South African Higher Education Act of 1997.[504]

The duties of Ontario boards include appointing and removing the President and senior administrators and appointing and removing teaching staff but only upon the recommendation of the President. Boards have the authority to determine the duties and salaries of all employees. They have general financial powers like determining the tuition fees, investing funds and borrowing money and have the authority to decide to affiliate or federate with other universities or colleges.[505] The Senate is a larger body than the governing board, and it has the authority to establish, control or regulate the academic or education policy of the university.[506] The authority to establish or terminate faculties, schools, institutes, departments or chairs is shared between the board and the Senate. Senate further determines all course study or curricula as well as admission standards and academic qualifications. It also exercises authority over conducting examinations and appointing examiners, awarding degrees, diplomas and

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[503] Jones and Skolnik 1995 *Paper presented at the Annual Meeting of the Association for the Study of Higher Education* 7 – 8; Amaral, Jones and Karseth *Governing Higher Education: National Perspectives on Institutional Governance* 218.

[504] This is discussed more fully in Chapter 2, para 2.3.2(b.1) above.

[505] Chan YL and Richardson AW "Board Governance in Canadian Universities" 2012 *Accounting Perspectives* 42 – 45; Jones and Skolnik 1995 *Paper presented at the Annual Meeting of the Association for the Study of Higher Education* 10 – 17.

[506] Jones GA, Shanahan T and Goyan P "Traditional Governance Structures – Current Policy Pressures: The Academic Senate and Canadian Universities" 2002 (8) *Tertiary Education and Management* 32 -33. For more on the Senate in Canadian universities, see Pennock L *et al.* "Assessing the Role and Structure of Academic Senates in Canadian Universities, 2000 – 2012" 2015 (70) *Higher Education* 503 – 517. For more on the work of a Senate member, see Jones, Shanahan and Goyan *CJHE* 2004 (XXXIV) 54 - 58.

academic awards.[507] The governing boards have limited decision-making authority over the Senate.[508] Faculties are subordinate to the Senate, and it is their responsibility to manage their particular discipline. The Dean is the head of the faculty and has to supervise the academic work of that particular faculty.[509]

The incorporating statute of each institution in Ontario determines the term of office of the President, which may not exceed four years, as well as his/her duties and responsibilities. The President is responsible for the day-to-day management and operation of the university. This role is very similar to that of the Vice-Chancellor in South Africa. Some of the functions of the President include recommending appointments, promotions, removal of members from academic and administrative positions, summoning faculty meetings, establishing committees as well as preparing and presenting the annual report and budget of the board and signing of contracts.[510]

Vice-Presidents or Provosts are usually responsible for the administration, advancement, research and academic functions and report to the President. These two positions are similar to those of the Deputy Vice-Chancellors, Vice-Principals or Pro-Vice-Chancellors in South African

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[507] Information supplied by Mr Barry McCartan from the Ministry following a visit to the Ministry on 28 June 2016. See in general Pennock *et al.* 2016 *Canadian Journal of Higher Education* 74 – 87; Jones, Shanahan and Goyan 2002 *Tertiary Education and Management* 29 – 44.

[508] The approximate size of a university Senate is between fifty-eight and sixty-one, although this may range from less than twenty members to several hundred members. Most members are elected to the Senate from within a specific constituency. Most of these members are elected from faculties, students, alumni, board members, non-academic employees etc. See Amaral, Jones and Karseth *Governing Higher Education: National Perspectives on Institutional Governance* 219; Shanahan, Nilson and Broshko *Handbook of Canadian Higher Education* 69; and Jones, Shanahan and Goyan (2004) *CJHE* 45. S 28 of the Higher Education Act of 1997 prescribes the Senate and its requirements in South Africa. See Chapter 2, para 2.4.2 above.

[509] Shanahan, Nilson and Broshko *Handbook of Canadian Higher Education* 71; Meek VL *et al.* (eds) *The Changing Dynamics of Higher Education Middle Management* (Springer 2011) 83 – 101.

[510] Shanahan, Nilson and Broshko *Handbook of Canadian Higher Education* 72.

universities. In Ontario, public universities also have various other senior officers, one of them being the Secretary or Registrar of the university. The duties of the Secretary include being secretary to the board and Senate, maintaining the rolls of graduates and honorary graduates of the university, signing diplomas and other duties as assigned by the President. The Secretary or Registrar is a key member of the executive leadership group of the university and is responsible for the legal documents, regulations and policies as well as for the student enrolment management of the university.[511] This role is similar to the role of the Registrar in South African universities.[512]

Beside the enacting statutes of each of the universities as well as the by-laws, several universities also have extensive governance policies and documents in place. The University of Toronto was established by the University of Toronto Act, 1971 as supplemented by the By-law Number 2.[513] Its other governing documents are noteworthy. The *Expectations and Attributes of Governors and Key Principles of Ethical Conduct* state that "…..the Governors are the stewards of the university and each governor must act in good faith with the view to the best interest of the university as a whole, to defend the autonomy and independence of the university and to enhance its public image.[514]" Furthermore, the university also has a *Mandate of Governance*[515] and *Principles of Good Governance,*[516] as

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[511] Shanahan, Nilson and Broshko *Handbook of Canadian Higher Education* Press 73.

[512] See Chapter 2, para 2.3.2(b)(b5.4) above on the role of the Registrar in South African universities.

[513] For the University of Toronto By-Law, see http://www.governingcouncil.utoronto.ca/Assets/Governing+Council+Digital+Assets/Policies/bylaw2.pdf (Date of use: 27 August 2018).

[514] See http://www.governingcouncil.utoronto.ca/Assets/Governing+Council+Digital+Assets/Task+Force+on+Governance/2010-2011+Documentation/Expect.pdf (Date of use: 27 August 2018). Also see the Association of Governing Boards "Board of Director's statement on the Fiduciary Duties of Governing Board Members" http://agb.org/sites/default/files/u27174/statement_2015_fiduciary_duties.pdf (Date of use: 27 August 2018).

[515] See

approved by the Governing Council on 28 *October 2010.* Although South Africa has similar documents like the *Guidelines for Good Governance Practices* and *Governance Indicators for Councils of South African Public Higher Education Institutions* and the institutional Council Codes of Conduct, the contents are not as specific as those of their international counterparts. These documents could be emulated by South African universities as good examples of sound corporate governance principles as they provide for wider coverage of governance principles and confirm the fiduciary duties and responsibilities of the management of these institutions.

(c) Investigation into the affairs of a university

The federal government of Canada has no direct role in education: its involvement is limited to contributing funds for higher education. There is nothing in the Minister of Training, Colleges and Universities Act that provides the Ministry with the power to take over the management of a university or to intervene in the affairs of an institution. The Minister may appoint a consultant or advisory body to investigate any serious concern.[517] One example of alleged mismanagement and breach of fiduciary duty took place at the Western University of London, Ontario. In June 2015, a task force was instructed by the Board of Governors of the institution in response to the issue of the President's compensation relating to a decision made by the governing board that doubled the President's salary. This was done despite having to retrench staff, the existence of vacant

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http://www.governingcouncil.utoronto.ca/Assets/Governing+Council+Digital+Assets/Task+Force+on+Governance/2010-2011+Documentation/mandate.pdf (Date of use: 27 August 2018). This document clearly articulates the difference between governance and administration, which is not done in the South African documents.

[516] See http://www.governingcouncil.utoronto.ca/Assets/Governing+Council+Digital+Assets/Task+Force+on+Governance/2010-2011+Documentation/principles.pdf (Date of use: 27 August 2018).

[517] Information supplied by Prof. Theresa Shanahan in an email dated 18 April 2016.

positions and bigger class sizes. Furthermore, in April 2015 there had been a vote of no confidence in the President by Senate.[518] The *Report of the Governance Review Task Force to the Board of Governors* was published on 19 November 2015.[519] This report explains the process the task team followed and confirms the fiduciary duties of the board as the duty of care, duty of loyalty and the duty of obedience.[520] In the author's opinion, these examples illustrate that there are high levels of autonomy at higher education institutions in Canada. The Ministry does not involve itself in investigations in the affairs of an institution in the event of allegations of mismanagement or irregularities. Instead, inquiries and/or independent taskforce teams are used to investigate and make recommendations to the institutions. These independent task teams can be organised by the university's governing board or it can emerge from an external source like the Auditor General. The Ministry exercises "soft power" over these matters. However, the Ministry is not powerless; it has the authority to rescind the incorporating statute of an institution, if deemed necessary.[521] The Ontario Ombudsman is another important stakeholder in external university governance.[522] In 2015, the Ombudsman Act of 1990[523] was

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[518] Information supplied by Prof Theresa Shanahan in an email dated 18 April 2016.

[519] For the full report see https://www.uwo.ca/univsec/pdf/Report_of_the_Governance_Review_Task_Force.pdf (Date of use: 27 August 2018). Another example occurred during the 1990s when financial audits turned up irregularities at three Ontario universities. The response was the creation of the Taskforce on University Accountability. The Ministry, the provincial students' association, faculty associations as well as the university staff association sponsored this investigation. Although the audit was triggered by the taskforce, the scope of the taskforce was system wide. The *Report of the Governance Review Task Force to the Board of Governors* called for increased accountability of governing boards and heightened university reporting requirements across the province at all public universities. This report started a trend of increased accountability reporting by university governing boards in Ontario as well as Canada.

[520] The Report of the Governance Review Task Force 5 – 6.

[521] It is an act of the provincial legislative assembly. Information supplied by Prof. Theresa Shanahan in an email dated 18 April 2016.

[522] See https://www.ombudsman.on.ca/About-Us/The-Ombudsman-Act.aspx (Date of use: 27 August 2018).

[523] Ombudsman Act R.S.O. 1990 c.O6. Hereinafter referred to as the Ombudsman Act.

amended to provide the Provincial Ombudsman with jurisdiction over school boards, municipalities and universities. This may have resulted in additional scrutiny of institutional governance and calls for changes to university governance.[524] The Ombudsman's authority to investigate complaints is described in the Ombudsman Act.[525]

(d) Fiduciary duties and standard of care by governing boards

According to Chan and Richardson, the fiduciary duties of board members are no different from those of board members of publicly listed companies. Board members must comply with the O.L.D. standard of conduct, which stands for "Obedience,[526] Loyalty[527] and Diligence"[528] in discharging their duties and governance responsibilities. These standards were drafted to assist university boards in understanding their responsibilities of due diligence arising from legislation that affects universities.[529] In Canada, the common law duties of care apply in addition to any standard of care

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[524] Information supplied by Mr. Barry McCartan from the Ministry during an interview with him on 28 June 2016.

[525] See https://www.ombudsman.on.ca/About-Us/Who-We-Oversee/Universities.aspx (Date of use: 27 August 2018). The Ombudsman has a full complaint procedure for both the public and for university employees. Complaints may be lodged online after all other avenues have been exhausted. See Chapter 2, para 2.3.2(b.6) above for a discussion of the offices of the ombudsman at public universities in South Africa.

[526] Obedience infers to acting honestly and in good faith; obeying the statutes, by-laws, terms and other applicable laws; and ensure that donor funds are spent in an accountable and responsible way in accordance with the donor's instructions See Council for Ontario Universities "Governance: Board of Governors and Senate" 2002 7.

[527] Loyalty includes to act in the best interests of the university; ensure that there is no conflict between the board and the university; board members should not compete with the university to the university's detriment; not to take an opportunity meant for the university for themselves. Council for Ontario Universities "Governance: Board of Governors and Senate" 2002 7.

[528] Diligence includes following the prudent person rule; the board member should use his/her skill and expertise in the best interests of the university; the board member should use common sense and good judgment; and the board member should be informed and act responsibly. Council for Ontario Universities "Governance: Board of Governors and Senate" 2002 7.

[529] Chan and Richardson 2012 *Accounting Perspectives* 33 – 34; Council for Ontario Universities "Governance: Board of Governors and Senate" 2002 7.

prescribed in other applicable legislation, including in some of the university Acts. The Ontario Corporations Act, which applies to public higher education institutions in conjunction with their incorporating statutes, contains a standard of care as follows: "Every director and officer, in exercising his or her powers and discharging his or her duties to the corporation, shall act honestly and in good faith with a view to the best interest of the corporation; and exercise the care, diligence and skill that a reasonable prudent person would exercise in comparable circumstances."[530]

The duties and responsibilities of the governing boards of Ontario universities are generally set out in the incorporating statutes of each university, the Ontario Corporations Act and the common law. In 1991, the Minister of Colleges and Universities formally constituted a task force to investigate university governance. Its mandate was to develop recommendations for a framework to provide for the clear accountability of Ontario's universities to the public.[531] One of the recommendations of the task force was that legislation should be introduced to provide for fiduciary duties and the duty of care and skill.[532]

Many of these constituting Acts are silent on director's duties and the standard of care, while other institutions specifically provide for them. One such an institution is the University of Ontario Institute of Technology. This university was established by the University of Ontario Institute of Technology Act, which provides for the powers and duties of directors, and stipulates the standard of conduct as follows, "every member of the board shall exercise the powers and carry out the duties of his or her office diligently, honestly, in good faith, in the best interests of the university and

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[530] See para 5.3.2(b) above for a discussion of fiduciary duties and the duty of care and skill in Canada.

[531] Ministry of Education and Training "University Accountability: A Strengthened Framework" 1993 *Report of the Task Force on University Accountability* 16.

[532] Ministry of Education and Training "University Accountability: A Strengthened Framework" 1993 *Report of the Task Force on University Accountability* 7.

in accordance with any other criteria set out in the by-laws of the university."[533] University officers and company directors have duties towards their institutions and must comply with a certain standard of care. There may be different standards of care for officers of business corporations, not-for-profit corporations and charitable corporations. In Ontario, a standard of care of officers and directors is governed by the Charities Accounting Act, which applies to "any corporation incorporated for religious, educational, charitable or public purpose."[534] The Charities Accounting Act deems the corporation to be a trustee of the property held in trust for a charitable purpose. The officers and directors have fiduciary duties to the corporation to ensure they fulfil their duties as trustees. The Ontario Corporations Act also provides for a standard of care in section 127(1).[535]

5.6 CONCLUSION

The legal and education systems in the USA and Canada are complex. Both these jurisdictions have federal systems of government, different to that of South Africa. The comparative review of their higher education regulation provided some interesting insights which could be beneficial to South Africa. Public universities in both jurisdictions of Georgia (USA) and Ontario (Canada) are corporations.[536] It was shown that higher education

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[533] S.O. 2002, c. 8. Hereinafter referred to as the UOIT Act. See s 9(3) of the UOIT Act. Similarly, the Carlton University in Ottawa has a Statement of General Duties, Fiduciary Responsibilities and Conflict of Interest, which has been adopted by the Board of Governors. This statement outlines not only the fiduciary duties of the Governors but also their responsibilities as Governors and their obligation to avoid conflicts of interests. See the questions and answers on the duties of the board of governors, http://carleton.ca/secretariat/boardofgovernors/wp-content/uploads/Board-Q-and-A.pdf (Date of use: 27 August 2018).

[534] R.S.O. 1990 c C.10, s 1(2).

[535] See para 5.3.2 above for a discussion of the Ontario Corporations Act and the standard of care it contains.

[536] See para 5.5.1 above for a discussion of public higher education in Georgia, USA.

institutions are more autonomous than their counterparts in South Africa.[537] Public universities in Ontario are not-for-profit corporations and are subject to their own incorporating statues as well as the Ontario Corporations Act.[538] In the USA and Canada, public higher education institutions are successfully run as corporations, with highly effective institutional governing boards which have high levels of autonomy and with very little involvement from the government.[539] In Ontario, universities report to the Minister of Training, Colleges and Universities[540] while in Georgia, universities report to the Board of Regents.[541] The approach to institutional autonomy by the Minister of Training, Colleges and Universities is very similar to the approach of the Board of Regents, but it differs quite significantly from that of the DHET in South Africa.[542] In both Georgia and Ontario, public institutions are kept at arm's length from their external governing bodies and are afforded high levels of autonomy.[543] The external governing bodies do not intervene in the affairs of public institutions unless they are requested to do so. Investigations occur in both jurisdictions, but they are handled differently than in South Africa, where the Minister of Higher Education and Training has the power to place a public institution under administration and can even dissolve its Council.[544] There is no legislation, charter or policy providing either the Ministry of Training, Colleges and Training in Ontario nor the Board of Regents in Georgia with

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[537] See discussion in para 5.5.1 and 5.5.2 above.

[538] See para 5.3.2 above for a discussion of the Ontario Corporations Act.

[539] See para 5.5.2 above for a discussion of the institutional autonomy of public higher education institutions in Ontario Canada.

[540] See para 5.5.2 above for a discussion of this Ministry.

[541] See para 5.5.1 above for a discussion of the Board of Regents.

[542] The Department of Higher Education and Training is discussed in Chapter 2, para 2.3.1 while the Board of Regents is discussed in para 5.5.1 above.

[543] This information was supplied during interviews conducted at the Board of Regents and Ministry of Training, Colleges and Universities

[544] See Chapter 3, para 3.3 above for a discussion of the ministerial interventions in South African higher education institutions.

authority to take control of public universities or to dissolve their institutional governing boards. In Georgia, the Board of Regents would investigate the affairs of public universities should there be any allegations of mismanagement or fraud[545] while the approach of their counterparts in Ontario is rather to leave the investigations to the institutional governing boards.[546] In both instances, there would be findings and recommendations to the governing board of these institutions. In both these jurisdictions, there have been universities that have found themselves in financial trouble or which have faced allegations of mismanagement and/or fraud. However, neither the Board of Regents nor the Minister of Training, Colleges and Universities has found it necessary to take any drastic steps against universities, supporting the finding of high levels of autonomy. The South African Higher Education Act of 1997 has been amended numerous times, and the Minister has incrementally been provided with increased powers of involvement in the affairs of public universities.[547] The author submits that some of the practices of the DHET counterparts in Ontario and in Georgia provide useful insights into how investigations might be conducted. Specific aspects to consider are improved governance and management structures, including implementing consequences for Council and management of universities where mismanagement has been identified; implementing system-wide governance policies similar to those in Canada, and making express provision for the fiduciary duties and duty of care of Council and senior management; implementing a compliance and ethics programme similar to the one implemented by the Board of Regents in Georgia; and having an internal audit and compliance function within the DHET to support the management of universities in meeting their governance, risk management, compliance and internal control responsibilities while aiding the improvement of organisational and operational effectiveness and

[545] See para 5.5.1(e) above for a discussion of the investigations conducted into the affairs of public universities in Georgia.

[546] See para 5.5.2(c) above for a discussion of the investigations conducted into the affairs of public universities in Ontario.

[547] See Chapter 3, para 3.4 above for a discussion of these amendments.

efficiency. Implementing internal audit and compliance measures will be beneficial to the DHET as they will be able to ensure that all public universities comply with Reporting Regulations. This does not imply the outsourcing of the governance responsibility which obviously remains the responsibility of a university Council. It is not recommended that South African public higher education institutions should be incorporated as companies, which would then be subject to the Companies Act of 2008. Rather, in Chapter 6 below, it is recommended that some South African company law provisions be included in the Higher Education Act of 1997 to provide clarity and certainty in respect of certain principles of corporate governance. In this regard, the statutory provisions relating to the fiduciary duties and the duty of care that is provided for in the Ontario Corporations Act and which are applicable to public higher education institutions, offer a good example.[548] It is clear from the report issued in 1993 by the Task Force on University Accountability that university accountability is taken seriously in Ontario.

[548] See para 5.3.2 above.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

6.1 INTRODUCTION

The objective of this thesis was to investigate governance challenges facing higher education institutions and to provide recommendations to assist these institutions in improving their governance and compliance practices and increasing their accountability. The research concluded that there is, in practice, little, if any, accountability for Council members and members of the executive management of public higher education institutions. Corporate governance practices in these institutions must improve, and Council members and members of executive management should, in appropriate circumstances, be held accountable for their actions. This chapter summarises the conclusions and recommendations made in previous chapters on ways to improve governance and compliance practices in South African higher education. The chapter also proposes certain amendments to the Higher Education Act of 1997 as well as the *2014 Reporting Regulations*.[1]

A comparative analysis of higher education regulation in Georgia, USA and Ontario, Canada was conducted in this research. This analysis compared the various company laws, corporate governance and higher education regimes with those of South Africa to determine what lessons could be learned from these international jurisdictions. The study also considered the South Africa Companies Act of 2008[2] and the Banks Act of 1990.[3] The purpose was not to undertake extensive scrutiny of the provisions of the two Acts as applied to company and banking law but to consider whether

[1] The suggested changes and amendments are indicated by underlining while deletions are indicated by strikethrough text.

[2] See Chapter 4, para 4.2 for a discussion of the Companies Act of 2008.

[3] See Chapter 4, para 4.3 for a discussion of the Banks Act of 1990.

some of the measures they contain might be appropriate to improve governance in the higher education sphere.

6.2 CONCLUSIONS AND RECOMMENDATIONS

6.2.1 Higher education challenges before and after the attainment of democracy

Governance challenges were present in higher education before and after the attainment of democracy in South Africa. This thesis considered the higher education landscape during these two periods, although the focus was more on higher education during the latter period.[4] It became apparent that higher education in South Africa was initially fragmented, confusing and rife with inequality. Today, higher education is primarily regulated through the Higher Education Act of 1997, as well as various policy documents.[5] *King IV* is also applicable to higher education institutions.[6] During the Apartheid era, higher education policies almost exclusively benefitted Whites. The legislation was put in place to prevent Blacks from attending universities earmarked for Whites. Blacks needed the consent of the Minister of Internal Affairs to be accepted into White universities. The promulgation of the Constitution underpinned the need for a systematic transformation of higher education aligned to the aspirations enunciated in the National Development Plan 2030 and African Agenda 2063. According to section 29 of the Constitution, read together with schedule 4, "everyone has the right to education, including basic adult education and further education, which the state, through reasonable measures, must make progressively available and accessible".

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[4] See Chapter 2, para 2.1.1 for more on the history of Apartheid.

[5] See Chapter 2, para 2.2 for a discussion of the Higher Education Act of 1997 as well as the relevant policy development in higher education.

[6] See Chapter 4, para 4.4.3 for a discussion of *King IV*.

6.2.2 Institutional governance

The Higher Education Act of 1997 is the primary source of law regulating higher education institutions, and it contains the legislative framework for higher education institutions.[7] The DHET is responsible for higher education in South Africa and derives its mandate from the Constitution. Higher education includes private and public higher education institutions. However, private higher education institutions must be registered companies and are governed by the Companies Act of 2008.[8]

The Higher Education Act of 1997 provides for the institutional governance structure of public higher education institutions.[9] The Council of a higher education institution is its highest decision-making body, while the Senate is responsible for academic decision-making. The Council of each public higher education institution may make an institutional statute, subject to the approval of the Minister of Higher Education and Training, that will focus on various matters not addressed in the Higher Education Act of 1997.[10] The institutional statute will, for instance, set out the composition of the executive management of that institution and the committees of Council and Senate. Section 30 of the Higher Education Act of 1997 confirms that the Vice-Chancellor of each institution is responsible for the day-to-day management and administration of the institution.[11] Although public higher education institutions are all subject to the Higher Education Act of 1997, they are autonomous and therefore their management style, and naming conventions of internal positions may differ. The executive management of a public higher education institution will generally include the Vice-

[7] See Chapter 2, para 2.3.1 for a discussion of the legislative framework for higher education institutions.

[8] For more on private higher education, see Chapter 2, para 2.3.2(a) above.

[9] See Chapter 2, para 2.3.2 for a discussion of institutional governance.

[10] Section 27 of the Higher Education Act of 1997; see Chapter 2, para 2.3.2(b.1).

[11] See Chapter 2, para 2.3.2(b.5).

Chancellor, Deputy Vice-Chancellors, the Registrar, Executive Deans and Executive Directors.[12] Based on the findings of this research, it is recommended that members of the Council and the executive management be subject to increased accountability.[13]

6.2.3 Institutional autonomy and public accountability

The 1997 White Paper and the Higher Education Act of 1997 confirm the institutional autonomy of higher education institutions. Institutional autonomy refers to the degree of self-regulation and administrative independence relating to various matters.[14] However, complete autonomy has never been promised since these public institutions receive public money and are therefore subject to public accountability. Each institution must thus report to the DHET on how it spends the public funding received from the government. The Higher Education Training Laws Amendment Act of 2012, which amended the Higher Education Act of 1997, provided the Minister with increased powers to intervene in the affairs of an institution. Several stakeholders in higher education expressed concerns that an increase in the Minister's powers to intervene in the affairs of an institution posed a threat to institutional autonomy.[15] One of the concerns raised was that the Minister of Higher Education and Training had been provided with more power to place a university under administration and to dissolve its Council, thereby threatening the institutional autonomy of higher education institutions.[16] However, this research also proved that there were justifiable

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[12] See Chapter 2, para 2.3.2 for a discussion of the institutional governance framework of public higher education institutions.

[13] See Chapter 3, para 3.3.2 for a discussion of the failures in South African universities; para 3.4 for the various amendments to the Higher Education Act of 1997; and paras 6.3 and 6.4 below for the various recommendations made.

[14] See Chapter 3, para 3.2(a) above for more on institutional autonomy.

[15] See Chapter 3, para 3.2.1 above for a discussion of institutional autonomy.

[16] See Chapter 3, para 3.4 above for a discussion of the increased powers of the Minister provided by this Act.

reasons for the increase of the Minister's powers. It is also unlikely that the Minister would invoke these powers unless absolutely necessary.

The comparative review contained in chapter 5 indicated that the position differs in international jurisdictions like the State of Georgia, and the Province of Ontario in Canada. In these jurisdictions, their statewide governing board or Ministry does not have the power to take over the management of the institution.

6.2.4 Ministerial interventions

Several failures have occurred in the governance of South African public higher education institutions. Some of these institutions were placed under administration or investigated by independent assessors during 2008 and 2012.[17] The independent assessors' reports of these troubled institutions were indicative of the following governance problems in public higher education institutions: factionalism in Councils; mismanagement of the affairs of the institution; Council members involving themselves in operational matters of the institution; ineffective functioning of Councils; fraudulent relationships between the Councils and the Vice-Chancellors and other staff of the institutions; and unacceptable conduct by Council members, to name a few. This thesis reviewed three independent assessors' reports, administrators' reports, as well as other documents relating to the investigation and/or administration processes of three of these institutions.[18] It the author's view these corporate governance failures in public higher education institutions played a direct role in the promulgation of the Higher Education and Training Laws Amendment Act of 2012. The amendments effected to the Higher Education Act of 1997 provided the Minister with more power to intervene in the affairs of a higher

[17] See Chapter 3, para 3.3.2(b) above for a discussion of three of these institutions that was placed under administration.

[18] See Chapter 3, para 3.3.2 above for a discussion of the governance failures, including a discussion of some of the institutions that were placed under administration.

education institution. In accordance with section 49A, the Minister can dissolve the Council of the institution and appoint an administrator to take over the functions of the Council. It was these amendments that caused concern amongst higher education stakeholders who feared that institutional autonomy was threatened by the increased powers of the Minister.[19] The subsequent Higher Education Amendment Act of 2016 attempted to address some of the concerns and to clarify other aspects.[20] However, not all the concerns were addressed or clarified.[21] It is the author's opinion that further amendments should be effected to increase the accountability of Council members and executive management as well as improve corporate governance processes and practices.[22]

6.2.5 Company law and corporate governance

The recommendations below are based on certain provisions relating to corporate governance issues contained in the Companies Act of 2008 and the Banks Act of 1990.[23] The accountability of directors was strengthened by the provisions in the Companies Act of 2008, which imposed statutory fiduciary duties as well as duties of care and skill on directors. This both enhanced and clarified their obligations in terms of the common law.[24] Accordingly, should directors fail to act in good faith, for a proper purpose, in the best interests of the company or not act with the necessary care and skill; they will be in breach of their statutory fiduciary duties and incur

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[19] See Chapter 3, par 3.4.2 for a comprehensive discussion of the ministerial interventions.

[20] See Chapter 3, para 3.4 above for a discussion of the 2016 amendments.

[21] See Chapter 3, para 3.4 for a discussion of the Higher Education Amendment Act of 2016.

[22] See para 6.3 below for recommendations regarding amendments to the Higher Education Act of 1997 in this regard.

[23] See Chapter 4, para 4.2 for a discussion of the Companies Act of 2008 and para 4.3 for a discussion of the Banks Act of 2008.

[24] See Chapter 4, para 4.2.5 and 4.2.6 for a discussion of these duties.

personal liability. There are no similar provisions in the Higher Education Act of 1997, and therefore there is no explicit statutory accountability for Council members nor the executive management of a public higher education institution. Although public higher education institutions are subject to common law fiduciary duties, no case law could be found where common law was invoked to hold a Council member or member of the executive management accountable for a breach of fiduciary duties. Moreover, there is no statutory provision for the suspension or removal of errant Council members. Although there are some public higher education institutions, whose Council Codes of Conduct provide for the removal of errant Council members, the author believes that these code of conducts might be *ultra vires* the Higher Education Act of 1997.[25] The Banks Act of 1990 goes further and not only imposes fiduciary duties and the duty of care and skill on directors of banks but also requires banks to establish a compliance and corporate governance function.[26]

The higher education regulations in Georgia (USA) and the Province of Ontario Canada were also considered in this research. The study indicated that it was necessary to clarify the fiduciary duties and duty of care and skill of Council members and members of the executive management in the Higher Education Act of 1997.[27] The Model Business Corporations Act (MBCA), the Georgia Code of 2017, the Canada Business Corporations Act (CBCA), the Ontario Business Corporations Act (OBCA) and the Canadian Not-For-Profit Corporations Act of 2010 contain similar provisions relating to the fiduciary duties of directors.[28] In both these jurisdictions, Public universities are corporations. This is not the case in South Africa, where

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[25] See Chapter 4, para 4.2.6 above for a discussion on the Council Code of Conduct.

[26] See Chapter 4, para 4.3 on a discussion of the Banks Act of 1990.

[27] See Chapter 5, para 5.2.1 – 5.2.3 for a discussion of the legal system of the USA and the various company law provisions relevant to the State of Georgia. Chapter 5, para 5.5.1 discusses higher education in the USA.

[28] See Chapter 5, para 5.2.3 for a discussion of corporate law in the State of Georgia and para 5.3.2 for a discussion of the corporate law in Ontario, Canada.

public higher education institutions are juristic entities in terms of the Higher Education Act of 1997 and report to the Department of Higher Education and Training. Private higher education institutions must be registered companies and are governed accordingly.[29]

South Africa experienced several corporate failures which undoubtedly played a role in the publication of the *King Reports* on corporate governance.[30] The fourth iteration of the *King Report* came into effect on 1 April 2017. Compliance with all of the *King Reports* has been voluntary except where provisions are specifically enforced by, for example, the *JSE Listings Requirements*. *King IV* applies to all organisations regardless of their manner of incorporation and is therefore applicable to higher education institutions.[31] *King IV* advocates the "apply and explain" approach. According to this approach, a governing body must apply the principles and explain how they are being given effect.[32] However, since this is a voluntary code, the consequences of non-compliance are uncertain and somewhat difficult to enforce.

6.2.6 *2014 Reporting Regulations*

The *2014 Reporting Regulations* issued by the DHET provide guidance on what should be included in the annual report of each public higher education institution.[33] These regulations were issued in two parts, namely, the regulations themselves and the implementation manual. However, the regulations contain some contradictory statements and confusing wording, which makes it difficult to distinguish between compliance requirements and mere guidelines. Based on the research undertaken, recommendations

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[29] See Chapter 2, para 2.3.2(a) for a discussion of private higher education institutions.

[30] See Chapter 4, para 4.4.2 for a history on the *King Reports*.

[31] See Chapter 4, para 4.4.3 for a discussion of *King IV*.

[32] See Chapter 4, para 4.4.3 for a discussion of *King IV*.

[33] See Chapter 4, para 4.4.4 for a discussion of the *2014 Reporting Regulations*.

are made below suggesting amendments to clarify ambiguous wording in the regulations.[34] Finally, it is recommended that it should be a requirement for higher education institutions to report on the interests they hold in commercial companies.

The specific recommendations are discussed below.

6.3 HIGHER EDUCATION ACT OF 1997

6.3.1 Introduction

Specific recommendations are made below, preceded by specific definitions that should be amended or included.[35]

6.3.2 Definitions

It is recommended that the definitions provided below be included in the Higher Education Act of 1997. Before or after each definition, the reason for its inclusion is briefly stated, with reference to where it is more fully discussed in the preceding chapters, and it is indicated where the amendments related to this aspect are made below.

(a) "Conflict of interest":

Section 27(7)(c) of the Higher Education Act requires a Council member to declare a possible conflict of interest. Similarly, the same is required for all employees in terms of section 34 of the Higher Education Act of 1997.

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[34] See Chapter 4, para 4.4.5 above for a discussion of the *2014 Reporting Regulations*.

[35] The amendments and recommendations will be indicated by way of "track changes" and deletions where relevant. This method was chosen as it is less complicated than the general way in which amendments to statutes are indicated. Sections not being amended will be indicated by way of ellipsis to avoid any unnecessary duplication of the sections to be amended. Although statutes usually contain relevant definitions in section 1 of the Act, the approach in the Companies Act of 2008 has been followed. For that reason the definitions are included in every section, where applicable.

Executive management, as employees, will, therefore, have to declare a conflict of interest. Hence, it is important that a conflict of interest be properly defined in the Higher Education Act of 1997. The definition, as provided for in *King IV* is used for recommending a definition as follows:[36]

> **"Conflict of Interest"** refers to a situation where a person cannot make a fair decision because he/she may be affected by the result. This conflict is used in relation to members of Council, Senate and its committees, and occurs when there is a direct or indirect conflict, in fact or in appearance, between the interests of such member and those of the organisation. It applies to financial, economic and other interests in any opportunity from which the organisation may benefit as well as the use of the property of the institution, including information. It also applies to the member's related parties holding such interests.

(b) "Knowingly, "knowing" or "knows"

In the author's opinion, it is essential to include the above definition, which is the same one as contained in section 1 of the Companies Act of 2008. This definition will clarify when a person is deemed to have knowledge of a situation.[37]

> **knowingly", "knowing" or "knows"** when used with respect to a person, and in relation to a particular matter, means that person either
> (a) "had actual knowledge of that matter;
> (b) was in a position in which the person reasonably ought to have (i) had actual knowledge; (ii) investigated the matter to an extent that would have provided the person with actual knowledge; or (iii) taken other measures which, if taken, would have reasonably been expected to have provided the person with actual knowledge of the matter.

(c) "Registrar"

The definition below is proposed to also refer to a Registrar of a public university, and not only with reference to a private institution, as follows:

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[36] As contained in *King IV* 11.

[37] See Chapter 4, para 4.2.8 for a discussion of section 424 of the Companies Act of 1973 relating to "knowingly."

> **Registrar"** in the context of a private higher education institution refers to the Registrar referred to in section 50(1). **"Registrar"** in the context of a public higher education institution refers to the compliance officer of the public higher education institution who is also responsible for the academic administration of the institution.

(d) "Share"

The reason for including a definition of a "share" and a "shareholder" is that the shareholding held by higher education institutions in companies is discussed below in the recommendations relating to the *2014 Reporting Regulations.* The recommended requirement that institutions must report on their interests held in these commercial companies is also discussed below. This definition is in accordance with section 1 of the Companies Act of 2008.

> **Share"** means one of the units into which the proprietary interest in a profit company is divided.

(e) "Shareholder"

This is in relation to any shareholder rights a public higher education may exercise with regards to any juristic entity, in accordance with the Companies Act of 2008 as follows:

> **Shareholder"** means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be;

6.3.3 Duties of Councils of public higher education institutions

The Council of a public higher education institution is constituted in terms of section 27 of the Higher Education Act of 1997 and is the highest decision making body of the institution.[38] Instances of apparent misconduct by Council members have indicated the need for clear provisions regarding

[38] See Chapter 2, para 2.3.2 above for a discussion of the Council of a public higher education institution.

their duties, removal, suspension and disqualification of these members. Mechanisms to deal with misconduct in addition to those provided for in terms of section 27(7D) of the Higher Education Act of 1997 are also necessary.[39] In some instances, merely disciplining Council members will not be enough. The recommendation below relates to the fiduciary duties and the duty of care and skill owed by directors to their company. It is recommended that similar provisions are included in the Higher Education Act of 1997 to ensure accountability in the event of misconduct by Council members. As seen above, section 76 of the Companies Act of 2008 provides some guidance in this regard.[40] It is also essential that there is provision for removing Council members as such members may not necessarily be employees. Even if they are employees of the institution when acting as Council members, they act in a different capacity. Therefore, as with the Companies Act of 2008, there is a need for provisions to remove Council members who do not act in the best interests of the institution.[41] Furthermore, as with the Companies Act of 2008, there should be eligibility criteria for candidates elected to the Council. No institution should allow a candidate who is disqualified or ineligible to be appointed to the Council of the institution.[42] Currently, there is no obligation on an institution to evaluate the knowledge and experience of their Council members, which may lead to inadequate levels of knowledge and experience. Amending the Higher Education Act of 1997 to compel the Council of an institution to evaluate the knowledge and experience of their

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[39] See Chapter 3, para 3.3.2 above.

[40] See Chapter 4, para 4.2.5 above for a discussion of section 76 of the Companies Act of 2008.

[41] See Chapter 4, para 4.2.9 for a discussion of the removal of directors.

[42] See Chapter 4, para 4.2.10 for a discussion of the delinquency proceedings in terms of the Companies Act of 2008.

Council members will improve governance. It is therefore recommended that section 27 be amended as follows:[43]

27(1) Member" in terms of this section, includes each council member, each member of a council committee and any person acting with delegated authority on behalf of the council. The council of a public higher education institution must govern the public higher education institution, subject to this Act, the institutional statute; and the council Code of Conduct;

(1A) Insert new 1A: the council and its members, as well as the council committees and their members, collectively and individually, and all who exercise delegated authority on behalf of council in terms of section 68(2), must exercise the powers and perform the functions of a council member

(a) in good faith and for a proper purpose;
(b) in the best interests of the institution;
(c) avoiding conflicts of interest; and
(d) with the degree of care, skill and diligence that may reasonably be expected of a person (i) carrying out the same functions in relation to the institution as those carried out by that member; and (ii) having the general knowledge, skill and experience of that member.[44]

(1B) Insert new 1B: In respect of any particular matter arising in the exercise of the powers or the performance of the functions of a member, will have satisfied the obligations of 27(1B)(a) – (d) if

(a) the member has taken reasonably diligent steps to become informed about the matter; either the member had no material personal or financial interest in the subject matter of the decision; and
(b) had no reasonable basis to know that any related person had a personal or financial interest in the matter; or the member complied with the requirements of section 27(7)(e);[45]

(2)……
……
(3)……
……

[43] For the sake of clarity and avoidance of confusion the whole section is stipulated here with the suggested changed underlined. The definitions are included in each section in line with the Companies Act of 2008.

[44] Section 76(3) of the Companies Act. See Chapter 4, para 4.2.5 above for a discussion of this section.

[45] This is in accordance with s 76(4) of the Companies Act (business judgment rule). See Chapter 4, para 4.2.7 above for a discussion of the business judgment rule. The inclusion of similar provisions to s 76(4) of the Companies Act of 2008 will provide protection for Council members in making their decisions.

(4)……
……

(4A) Insert a new 4A: All members of council, irrespective of how they were selected or appointed, will be subject to the Code of Conduct as prescribed in subsection 7E.

(5) ……

(5A) The eligibility criteria for nomination and election as a member of council of a public higher education institution, must be determined by the institutional statute and this Act.

(a) A person is ineligible to be a member of council, if a person is –

(i) a juristic person;

(ii) an un-emancipated minor, or is under a similar legal disability; or

(iii) does not satisfy any qualification criteria set out in the Institutional Statute of the public higher education institution; or

(iv) was declared a delinquent director in terms of the Companies Act of 2008 for the period as described in section 69(9); `

(b) A person is disqualified to be a member of council if-

a court has prohibited that person to be a director, or declared the person to be delinquent in terms of section 162 of the Companies Act of 2008, or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984); the person-

(i) is an unrehabilitated insolvent;

(ii) is prohibited in terms of any public regulation to be a member of council;

(iii) has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or

(iv) has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence-

(aa) involving fraud, misrepresentation or dishonesty;

(bb) in connection with the promotion, formation or management of a company, or

(cc) under this Act, the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984, the Competition Act, the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), the Securities Services Act, 2004 (Act No. 36 of 2004), or Chapter 2 of the Prevention and Combatting of Corruption Activities Act, 2004 (Act No. 12 of 2004).

(5B) Any person who has been a member of a council of a public higher education institution –

(a) under circumstances contemplated in sections 49(B)(a) and 49E;

(b) against whom an independent assessor has made an adverse finding in the report contemplated in section 47(1)(b); and

(c) any person who is ineligible in terms of section (5A).

(5C) Insert a new 5C: A public higher education institution must not:

(a) knowingly permit an ineligible or disqualified person to serve as a member of council; and

(b) allow a person, who becomes ineligible or disqualified while serving as a member of council, to continue as member immediately;[46]

(6)……
……

(7) A member of a council or a member of a committee of a council or a person with delegated functions in terms of section 68(2) –

(a) must be a person with knowledge and experience relevant to the objectives, and governance of the public higher education institutions. Each institution may assess the knowledge and experience of its council members annually or in the event of a vacancy and may set minimum requirements for a member to ensure that the council can rely on the required depth of knowledge and experience

(b) must participate in the deliberations of the council or the committee of council, or exercise any delegated function in the best interests of the public higher institution concerned;

(c) must, before he or she assumes office, and annually for as long as he or she continues to hold such office, declare any business, commercial or financial activities, as well as any directorship held by him/her and those of his or her spouse or related person; and declare any gifts that he or she has received from entities that undertake business with the public higher education institution, or potential suppliers or service providers of the institution ~~undertaken for financial gain~~ that may raise a conflict or a possible conflict of interest with the public higher education institution;[47]

(d) may not place him/her under any financial or other obligation to any individual or organisation that might seek to influence the performance of any function of the council; and

(d) neither a member of council, nor his or her spouse or a related person may ~~not~~ place him/her under any financial or other obligation to any individual or organisation that may seek to influence the performance of any function of the council; and

(e) neither as member of council, nor his or her spouse or a related person may ~~not~~ have a conflict of interest with the public higher education institution concerned.

(7A)……
……

(7B)……
……

(7C)……
……

[46] This formulation is based on ss 69 and 162 of the Companies Act of 2008 in respect of directors. See Chapter 4, para 4.2.10.

[47] For instance, any Council member must declare directorships he/she holds in companies to ensure that there is no conflict of interest in awarding tenders for instance. Furthermore, Council members must declare any gifts that they receive from any businesses to ensure that there is no favoritism in awarding tenders or services.

(7D)……
……
(7E)……
……
(8)……
……
(9)……
……
10(1) Insert a new section 10: A member of a council of a public higher education institution shall vacate his or her position on the council, or council committee, if he or she –
(a) dies;
(b) resigns;
(c) is absent without leave from three ordinary meetings of the council in any twelve-month period;
(d) is declared to be of unsound mind by a court;
(e) is removed from an office of trust by a court;
(f) is declared a delinquent director by a court in terms of the Companies Act of 2008 for a term as prescribed in section 69(9);
(g) is declared a delinquent council member by a court;
(h) is convicted of an offence and sentenced to a term of imprisonment;
(i) becomes ineligible in terms of section 27(5B);
(11)(1) Insert a new section 11: The council of each public higher education institution shall have the power remove a member of council, irrespective of who elected such council member, by vote of the majority of the members of council and in accordance with the relevant voting procedure of that particular higher education institution, prescribed by its institutional statute.
(2) Prior to a vote as provided for in s 11(1),
(a) a member must be given notice of the council meeting and the intended vote for the removal of that member; and
(b) the member must be afforded a reasonable opportunity to make a representation, in person or through a representative, to the meeting, before such a vote can proceed.
(3) If a member has
(a) become ineligible or disqualified in terms of section 27;
(b) Incapacitated to the extent that the member is unable to perform the functions of a member, and is unlikely to regain that capacity within a reasonable time;
(c) Neglected or been derelict in the performance of the functions of a member; or
(d) breached one or more than one of the provisions of the Code of Conduct of the public higher education institution;
then council, excluding the specific member, must determine the matter by way of voting and may remove a member whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict as the case may be, subject to reasonable notice given to the member in terms of subsection (2) above as well as

allowing the member opportunity to make representations prior to voting.

12(1) Insert a new section 12: Notwithstanding any liability incurred in terms of the provisions of this Act, a member may be held liable for a breach of a fiduciary duty, for any loss or damage or costs sustained by the public higher education institution as a consequence of any breach by the member of a duty contemplated in sections 27(7), 28(5) and 38A.

(2) A member is liable for any loss, damage or costs sustained by the institution as a direct or indirect consequence of the member having

(a) acted in the name of the public higher education institution, signed anything on behalf of the institution or purported to bind the institution or authorise the taking of any action by or on behalf of the institution, despite knowing that the member lacked the necessary authority in terms of the institution's delegation of authority;

(b) been a party to an act or omission by the institution despite knowing that the act or omission was calculated to defraud an employee, member or any stakeholder of the institution or had another fraudulent purpose;

(c) signed, consented to or authorised the publication of (i) any financial statements that were false or misleading in a material respect or (ii) signed any contract or tender without the proper authorisation process.

(4) Proceedings to recover any loss, damages or costs for which a person is or may be held liable in terms of this section may not be commenced more than three years after the act or omission that gave rise to that liability.

(5) In any proceedings against a member other than for willful misconduct or willful breach of trust, the court may relieve the member, either wholly or partly, of any liability listed in this section, on any terms the court considers just if it appears to the court that:

(a) The member is or may be liable but has acted honestly and reasonably; or

(b) Having regard to all the circumstances of the case, including those connected with the appointment of the member, it would be fair to excuse the member. [48]

6.3.4 Committees of Councils and Senates

King IV no longer prescribes specific committees to be established, but instead recommends that each governing body must assess what

[48] The proposed new s 27(12) of the Higher Education Act of 1997 is based on s 77 of the Companies Act of 2008.

committees are needed for that particular organisation.[49] Section 29 of the Higher Education Act of 1997 provides for committees of Council and Senate.[50] Various committees were considered above.[51] It is recommended that the *2014 Reporting Regulations* provide at least for the following specific Council committees: a committee on commercialisation and innovation, remuneration committee, audit committee, risk committee, social and ethics committee, information technology committee, tender and procurement committee, and governance and compliance committee.[52] The Council committees will be responsible for the governance oversight of these committees. Moreover, an institution may arrange that some of its committees are combined where it would still meet the objectives of the regulations.

The following amendment to section 29 is therefore proposed:

> 29(4) <u>Each public higher education institution must have certain committees as prescribed from time to time in the Regulations.</u> The composition, manner of election, functions, procedure at meetings and dissolution of a committee and a joint committee are determined by the institutional statute or institutional rules.

6.3.5 The principal of a public higher education institution

Section 27(1) of the Higher Education Act of 1997 states that the Council of a public higher education institution must govern it. Section 30 provides

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[49] Institute of Directors South Africa *King IV* practice note for Governing Body Committees February 2018 3.

[50] See Chapter 4, para 4.4.3 above for a discussion of s 29 of the Higher Education Act of 1997.

[51] See Chapter 4, para 4.4.3 and 4.4.4 for the various committees provided for in *King IV* and the *2014 Reporting Regulations.*

[52] These committees will be discussed in para 6.3 below. No recommendations will be made with regards to Senate. This research considered whether the Higher Education Act of 1997 should rather include the committees, however, the *2014 Reporting Regulations* already provide for certain of these committees. Once the *Reporting Regulations* are revised and the confusing wording is clarified, all the higher education institutions must comply therewith, which will include these committees.

that its principal must be responsible for the management and administration of the public higher institution. It is therefore recommended that the section is amended to clarify that the Principal is responsible for the management and operational matters of the institution. Furthermore, there is nothing in section 30 to state that the principal must report to the Council and be bound to Council decisions. Although this might be obvious, it is suggested that it be included for purposes of clarity. It is my recommendation that this must be clarified in the Higher Education Act of 1997 as follows:

> 30 The principal of a public higher education institution is responsible for the day-to-day management and administration of the public higher education institution, and report to council. The day-to-day management and administration of the institution must be subject to this Act and the institutional statute.

6.3.6 Institutional statute

The author considered making recommendations to amend section 32 of the Higher Education Act of 1997. It was found not to be necessary to propose any amendments to this section. The reason for considering any amendments was the way in which section 32(1) was drafted. The word "may" used in section 32(1) gives the impression that making an institutional statute is optional. Section 33(3) provides clarity in this regard as it confirms that every higher education institution that does not make its own institutional statute must rely on the standard institutional statute.[53] In the author's opinion the standard institutional statute adequately covers all relevant matters relating to a public higher education institution's institutional governance.

[53] *Government Gazette* Nr. 23065 (GN. 377) 27 March 2002.

6.3.7 Compliance function

In addition to the Companies Act of 2008, the Banks Act of 1990 also provides some guidance on further recommendations to improve governance in higher education institutions.[54] The Banks Act of 1990 not only provides for bank directors' fiduciary duties and duties of care and skill but also clearly provides for a compliance function as well as a corporate governance function.[55] It is submitted that this is also required in respect of higher education institutions. It is therefore recommended that a new section 38A be inserted in the Higher Education Act of 1997, providing as follows:

> 38A A public higher education institution shall establish an independent compliance unit as part of its risk management framework.
> (a) The compliance unit shall be headed by a compliance officer, who shall perform his/her functions with such care and skill as can reasonably be expected from a person responsible for such a function in a similar institution.
> (b) The compliance officer's functions and mandate shall be dealt with in the *2014 Reporting Regulations Manual*.[56]

6.3.8 Corporate governance

The Banks Act of 1990 also provides explicitly for effective corporate governance processes. Such provisions are, in view of recent shortcomings found in the corporate governance practices of some higher education institutions, also required in the Higher Education Act of 1997. Although these amendments might not prevent all governance challenges at public higher education institutions, they should serve as deterrent by ensuring

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[54] The Companies Act of 2008 is discussed in Chapter 4, para 4.2, while the Banks Act of 1990 is discussed in para 4.3.

[55] See Chapter 4, para 4.3 for a discussion of the Banks Act of 1990.

[56] This is based on s 60A of the Banks Act of 1990; and in compliance with recommended practices 90 – 99 of *King IV*. See para 6.3.3 below for a discussion of the compliance officer.

that there is accountability for management and council members who have not acted in the best interest of the institution. The insertion of a new section 38A of the Higher Education Act of 1997 is therefore proposed:

Before (1) insert 38A as follows:

38A (1) The members of a council and the executive management of a public higher education institution shall establish and maintain an adequate and effective process of corporate governance which shall be consistent with the nature, complexity and risks inherent in the activities and the business of the institution concerned;

(2) The process of corporate governance shall be established with the objective of achieving the public higher education's vision, mission and strategic objectives efficiently, effectively, ethically and equitably (within acceptable risk parameters), to ensure –

(a) compliance with the strategic framework and guidelines established for the public higher education institution concerned;

(b) commitment by the members of council and the executive management of the public higher education institution to adhere to behaviour that the institution recognised and accepted as correct and proper as to enhance the vision, mission and strategic objectives of a public higher education institution;

(c) a balance of interest of any stakeholder, employee, student or other interested persons who may be affected by the conduct of members of council or the executive management, within a framework of effective accountability;

(d) That mechanisms and procedures are established and maintained to minimise or avoid potential conflicts of interest between the interests of the public higher education institution and the personal interest of members of council or executive management of the public higher education institution;

(e) responsible and ethical conduct by the members of council as well as the executive management of the public higher education institution;

(f) achieve the maximum level of efficiency of the public higher education institution, within an acceptable risk profile for the public higher education institution;

(g) that the council of the public higher education institution retains control over the strategic and objective direction of the public higher education institution, whilst enabling the members of council as well as the executive management of the public higher education to manage the institution's operations and the achievement of the agreed strategic objectives; and

(h) compliance with all applicable laws and regulations as well as any applicable corporate governance principles.[57]

6.3.9 Funds of public higher education institutions

Section 40 of the Higher Education Act of 1997 contains provisions relating to the funds of a public higher education institution. It is suggested that this section also include a reference to loans provided by higher education institutions to external commercial entities.[58] Section 40(2)(a) requires Council approval in the event of the institution entering into a loan or overdraft agreement. Section 39 (3A) of the Higher Education Act of 1997 provides that if the Council of a public higher education institution fails to comply with any provision of the Higher Education Act of 1997 under which an allocation from money appropriated by Parliament is paid to the institution; or condition subject to which any such allocation is paid to such institution, the Minister may in writing request such Council to comply with the provisions or condition within a specified period. It is proposed that loans should also be declared in the annual report of each public institution.[59] The latter should also be included in the reporting of each public higher education institution. The following amendments to section 40(3) are thus recommended:

40(3)(a) Subject to paragraph (b), a public higher education may only, by way of a resolution of its council, and not taking into account any vacancy that may exist, embark on any
(i) Construction of a permanent building or other immovable infrastructural development;
(ii) Purchase of immovable property;
(iii) Long-term lease of immovable property; and
(iv) Provision of a loan to any external party, including the companies it holds shares in.

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[57] The proposed formulation of s 38B is based on s 60B of the Banks Act of 1990. See Chapter 4, para 4.3 above.

[58] See Chapter 2, para 2.2.3 above for a discussion of the Higher Education Act of 1997.

[59] In accordance with s 40(3)(b) of the Higher Education Act of 1997, the Minister's consent is also required under certain circumstances. See para 6.4.2 below for the recommendations in this regard.

(b) Any action contemplated in paragraph (a) must be approved by the Minister if the value of such development or property exceeds five percent of the average income of that public higher education institution received during the two years immediately preceding such action. Loans provided in terms of s 40(3)(iv) must be reported in the annual financial report of each public institution following the reporting guidelines provided for public institutions.

6.3.10 Ministerial directive

Section 42 of the Higher Education Act of 1997 provides for ministerial directives to be issued by the Minister to the Council of a higher education institution.[60] The 2016 amendments to this section make it clear that placing a public higher education institution under administration will be an option of last resort. These amendments were discussed in Chapter 4 above. In the author's opinion, although section 42(d) requires compliance with all laws, it is essential to specifically mention the Prevention and Combating of Corrupt Activities Act 12 of 2004.[61] The objective of this Act is to combat corruption and fraud, and it specifically places an obligation on the Vice-Chancellor of an institution to report corrupt activities.[62] This Act is relevantly recent and compliance with it is not clear. However, it seems that the Vice-Chancellors of public institutions are unaware of this obligation, or they are unaware that they may be found guilty of an offence in terms of this Act for non-compliance.[63] It is the author's view that by creating awareness of this Act and the obligation it places on the Vice-Chancellor of an institution, more corrupt activities will be reported, thereby improving governance at institutions. It is also essential to provide that the Minister may issue a directive to a public higher education institution in the event that its annual report does not comply with the *Reporting Regulations*. The following amendments to section 42 are, therefore recommended:

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[60] See Chapter 3, para 3.4.2(a) for a discussion of s 42.

[61] Hereinafter referred to as PRECCA.

[62] Section 34(1) of PRECCA.

[63] Section 34(2) of PRECCA.

Section 42(1)(c) should be amended as follows:

> 42(1) The Minister may issue a directive to the council of a public higher education institution if the Minister, after having complied with the provisions of subsection (3), has reasonable grounds to believe that the Council or the management of that public higher education institution
> (a) .....
> (b) .....
> (c) has acted in an unfair, discriminatory or wrongful manner towards a person to whom it owes a duty under this Act or any other law;
> (d) has failed to comply with any law, and more specifically has failed to comply with the provisions of the Prevention and Combating of Corrupt Activities Act 12 of 2004.
> (e) .....
> (f) has obstructed the Minister or a person authorised by the Minister in performing a function in terms of this Act and has failed to comply with the *Reporting Regulations* for public higher education institutions for a period of two consecutive reporting periods.

6.4 THE *2014 REPORTING REGULATIONS*

6.4.1 Introduction

The *2007 Reporting Regulations,* which preceded the *2014 Reporting Regulations*, clearly stated that all public higher education institutions *must* adhere to both the regulations and the implementation manual.[64] The *2014 Reporting Regulations* merely state that the implementation manual is a *guide* for such an institution to compile its annual report.[65] For the avoidance of doubt, the *2014 Reporting Regulations* must be clear that all public higher education institutions must adhere to and comply with them. This formulation is somewhat confusing and ambiguous, as institutions may be unsure whether or not they have to adhere to all the principles contained in the *2014 Reporting Regulations* or whether they are merely presented as guidelines. This perceived uncertainty was apparent from the review of the annual reports of certain public universities, as discussed

[64] See Chapter 4, para 4.4.4 above for a discussion of the *2014 Reporting Regulations*.

[65] See the 2007 *Annual Reporting Regulations* 12.

above.[66] These annual reports show that public higher education institutions interpreted the *2014 Reporting Regulations* differently, which in turn led to differences in their reporting on certain matters and the failure to meet some requirements. For instance, while it is a requirement of the *2014 Reporting Regulations* that the members of an audit committee be listed,[67] one of the institutions reviewed listed the members of its audit committee, thereby confirming its independence, while the other institution did not list its members.[68]

Both the regulations and the implementation manual should be regarded as one document, and it should be clear that higher education institutions should comply with the entire document. The implementation manual contains important information relating to the annual reporting requirements as well as the recommended Council committees. It is, therefore, crucial that no confusion relating to compliance with the implementation manual should exist. It seems that public higher education institutions perceive the *2014 Reporting Regulations* as merely a guideline rather than imposing a statutory framework for compliance. The *2014 Reporting Regulations* are also at times unclear on what is expected of higher education institutions, resulting in confusion and non-compliance.[69]

The *2014 Reporting Regulations* confirm that it is one of the duties of the Council of a public higher education institution to ensure compliance with relevant laws.[70] However, there are no regulatory checks in place to ensure

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[66] See Chapter 4, para 4.4.4 above for a discussion of the review that was done on three annual reports.

[67] See *2014 Reporting Regulations* 24 – 25.

[68] Chapter 4, para 4.4.4 above for a discussion of these requirements of the audit committee in the *2014 Reporting Regulations.*

[69] See Chapter 4, para 4.4.4 above for a discussion of the *2014 Reporting Regulations*.

[70] *2014 Reporting Regulations* 16. See also s 42(d) of Higher Education Act of 1997. For instance, the Promotion of Access to Information Act of 2000 (PAIA) requires that all public bodies publish a manual in terms of s 14 describing the way in which records and information can be requested from public bodies. It came to light that various

compliance with legislation.[71] The *2014 Reporting Regulations* also state that "university Councils of public higher education institutions are *encouraged* to comply with relevant standards of accountability for governance and management". It is suggested this should be a requirement, and not a recommendation, similar to the listing requirements of JSE-listed companies,[72] thereby ensuring sound and effective governance practices.[73]

The recommendations regarding the *Reporting Regulations* follow below. The numbering of the paragraphs will correspond with the numbering in the *Reporting Regulations*.[74] Existing, unaffected text is only reflected where necessary to understand the proposed amendment or to provide context.[75] Current text that is not repeated is indicated by an ellipsis. For ease of reference, the *2014 Reporting Regulations* will be attached hereto as Annexure A.

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universities do in fact not have these manuals or processes in place or available on their websites. It is recommended that the DHET should be able to monitor compliance to applicable legislation.

[71] Upon requesting information from the DHET regarding the compliance mechanism used, their response was that the function of the University Branch at the DHET was to analyse the annual reports received to check for compliance. In the event of non-compliance, the DHET would write to the institution involved and request them address the areas of non-compliance. However, no information was received regarding the mechanisms used. In light of the various instances of possible non-compliances picked up from analysing the two annual reports, it seems that the DHET compliance mechanisms and procedures could be improved. The DHET also confirmed that universities must comply with all of the provisions in the *2014 Reporting Regulations*. This information is as received from Mrs. Rekha Bennideen on 22 October 2016. See Chapter 4, para 4.4.4 for a discussion of the *2014 Reporting Regulations*.

[72] See Chapter 4, para 4.4.2 for a discussion of the JSE listing requirements.

[73] The JSE listing requirements make it clear that annual reports must include a narrative statement of how a company has applied the principles contained in the King Code, and the company must provide explanations with regard to any non-compliance. See s 8.63 of the JSE *Listing Requirements*.

[74] The *2014 Reporting Regulations,* including the implementation manual, contain page numbers on both the top and bottom page. For the sake of clarity, the reference to page numbers of the regulations refers to the page number indicated at the top of the page.

[75] The *2014 Reporting Regulations* makes use of a capital C when speaking about Council, therefore the use of Council with a capital C will be used for this portion of the recommendations.

(1) REPORTING REGULATIONS

PART ONE – DEFINITIONS AND APPLICATION

DEFINITIONS

In order to align the *Regulations* with *King IV*,[76] the King definition should be changed as follows:

> ~~"King III" means the King Report on Corporate Governance in South Africa, 2009, together with the King Code of Corporate Governance in South Africa, 2009."~~ King IV" means the King Report on Corporate Governance in South Africa, 2016.

(2) APPLICATION

The application of the *2014 Reporting Regulations* and what each institution must report on must be made clear. The following amendments are recommended to avoid any confusion:

> (1) These regulations apply to all public higher education institutions.
> (2) Each public higher institution must:
> (a) .....
> (b) .....
> (c) .....
> (d) .....
> (e) .....
> (f) Submit an annual report containing all the reports and other relevant information contained in the implementation manual attached to these regulations.
> (g) Declare any interest it holds in any company that is subject to the Companies Act of 2008 in accordance with the requirements of the implementation manual.[77]

[76] *King IV* is discussed in Chapter 4, para 4.4.3 above.

[77] This paragraph can be found in *2014 Reporting Regulations* 6.

(7) ANNUAL REPORT

It is recommended that this paragraph be changed to clarify that the annual report must be an integrated report. Further to this, it should be a requirement that the names of the members of the committees be reported to ensure high levels of independence and that there are increased reporting requirements for the remuneration of executive management.[78]

7. (1).....
(2) .....
(3) .....
(4) Each public higher education institution must submit to the Department by 30 June of year three hard copies and an electronic version of its integrated[79] Annual Report for year n-1 which must –
(a) report on the work of the institution and the extent to which the objectives as set out in the Annual Performance Plan have been met, and the extent to which the institution believes that it has met the objectives and goals of its Strategic Plan:
(b) include the following information for year n-1:
(i) .....
(i) .....
(ii) .....
(iii) .....
(iv) .....
(v) .....
(vi) the report of council on risk assessment and management of risk, which must include the names of the members of the Risk Committee;
(vii) .....
(viii) .....
(ix) .....
(x) the statement of the Audit Committee on how it has fulfilled its duty, which must include a list of the names of the members of the Audit Committee;
(xi) .....
(aa).....
(bb) the annualised gross remuneration for Executive Management is disclosed in a note showing the gross remuneration paid to each individual in their executive capacity and separated gross remuneration paid to him/her by the institution for other services. The remuneration must also include any bonuses received by executive management and any other benefits like housing, car, cell phone and travel allowances.

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[78] See Chapter 4, para 4.4.3 where the committees contained in the *2014 Reporting Regulations* are discussed.

[79] See Chapter 4, para 4.4.4 where *King IV* and integrated reporting is discussed.

(cc)the gross remuneration of each council member paid to him or her for his work as a council member disclosed in a note to the annual financial statements. This must include any bonuses paid to council members as well as any benefits.

(xiii)……[80]

PART THREE

IMPLEMENTATION MANUAL

(8) (1) The Department developed a manual to the Reporting Regulations ~~as a guide~~ to assist public higher education institutions ~~for~~ with compiling their annual reports, annexed hereto as Annexure A. All institutions must comply with the implementation manual and all the requirements therein and must be reflected in the annual report of each public higher education institution.[81]

6.4.2 Recommended changes to the implementation manual of the *2014 Reporting Regulations*

The implementation manual in the *2014 Reporting Regulations* is discussed above.[82] It is suggested that the way in which this manual is drafted must be changed to minimise any confusion. The manual must make it clear that the annual reports of all public higher education institutions *must* contain all the information required by the *Regulations* and that this information will be verified for compliance by the DHET. The recommended changes to the implementation manual are set out below. Only those parts of the manual affected by the suggested recommendations and changes are referred to. The proposed amendments are indicated by way of underlining, while the deletions are indicated in strikethrough. Existing unaffected text is only reflected where necessary to understand the proposed amendment or to provide context. Existing text that is not repeated is indicated by an ellipsis.

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[80] This paragraph can be found in the *2014 Reporting Regulations* 9 – 10.

[81] This paragraph can be found in the *2014 Reporting Regulations* 11.

[82] The *2014 Reporting Regulations* are discussed in Chapter 4, para 4.4.4 above.

ANNEXURE A

IMPLEMENTATION MANUAL FOR REPORTING BY PUBLIC HIGHER EDUCATION INSTITUTIONS

1. INTRODUCTION

The introduction of the implementation manual should be amended to include reference to the International Integrated Reporting Framework (IIRF), the International Financial Reporting Standards (IFRS) as well as *King IV*.[83] It is therefore recommended that the introduction be amended as follows:

> Public higher education institutions in South Africa enjoy statutory independence and considerable ~~statutory independence and~~ autonomy. This independence makes it important that the structures of governance and management of these institutions should account to both internal and external stakeholders in a consistent, transparent and prescribed manner. The developments in reporting and the emphasis on "harmonisation," both nationally and internationally, require that reporting should comply with international generally accepted practice. ~~according to the IFRS.~~ The reporting for all higher education institutions must be done in terms of the International Integrated Reporting Framework (IIRF), the International Financial Reporting Standards (IFRS), and the *King IV Report on Corporate Governance (King IV).*[84]

2. PURPOSE OF THE MANUAL

The purpose of the manual should make it clear that high standards of reporting are required instead of minimum standards. By increasing the levels of reporting, the governance practices of higher education institutions will have to improve. Further to this, the wording should be clear that all higher education institutions must comply with both the

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[83] *King IV* is discussed in Chapter 4, para 4.4.3 above, which also included a discussion of the IIRF.

[84] As above, the changes and recommendations are indicated by way of underlining, while the deletions are indicated by way of strikethrough of text. In order to avoid rewriting the whole manual, only the paragraphs affected by changes and amendments have been referred to.

regulations and the implementation manual to avoid any confusion as to what must be reported. It is therefore recommended that the purpose statement be amended as follows:

> The primary purpose of this manual is to provide guidance on the format and content of the annual report, and to provide a framework for reporting by public higher education institutions aimed at ensuring ~~minimum~~ high standards of reporting by governance structures and ~~by~~ management. ~~The manual constitutes the determination of the Minister of Higher Education and Training in terms of the Higher Education Act of 1997 (Act No. 101 of 1997), as amended~~. These regulations and the implementation manual are issued in terms of section 69 of the Higher Education Act of 1997 and must be complied with by all public higher education institutions.[85]

4. GOVERNANCE OF SOUTH AFRICAN PUBLIC HIGHER EDUCATION INSTITUTIONS

It is necessary to amend this paragraph to align it with the principles of *King IV*.

> Conditions confronting higher education institutions have become more demanding with regard to good management over the past two decades. Constantly dwindling opportunities for acquiring essential resources and, in recent years, increasing competition among public higher education institutions from a growing sector of private higher education institutions, are but a few examples of factors that have contributed to a new and challenging environment.
>
> Compliance with the demands on public higher education institutions to adopt the best governance, financial and general management practices under these increasingly difficult economic conditions are largely dependent on the availability of financial and other relevant information in accordance with best practices.
>
> Public higher education institutions must demonstrate good governance, sustainability and corporate citizenship. ~~King III~~ King IV describes these in the following terms:
>
> - Good governance is essentially about ethical and effective leadership. Leaders should rise to the challenges of modern governance. Such leadership is characterised by the ethical values of integrity, competence, responsibility, accountability, fairness and transparency and based on moral duties.

[85] This paragraph is in accordance with the *2014 Reporting Regulations* 14.

Responsible leaders direct institutional strategies and operations with a view to achieving sustainable economic, social and environmental performance;[86]

- Sustainability is the primary moral and economic imperative of the 21st century. It is one of the most important sources of both opportunities and risks for public higher education institutions. Nature, society and public higher education institutions are interconnected in complex ways that should be understood by decision-makers. Most importantly, current incremental changes towards sustainability are not sufficient - there needs to be a fundamental shift in the way public higher education institutions act and organise themselves; and

The concept of corporate citizenship which flows from the fact that a public higher education institution is a juristic person and should operate in a sustainable manner. Sustainability considerations are rooted in the South African Constitution which is the basic social contract that South Africans have entered into. The Constitution imposes responsibilities upon individuals and juristic persons for the realisation of the most fundamental rights.[87] The Annual Report should demonstrate an institution's commitment to these and its achievements in what can be referred to as an integrated report.

The governance responsibilities of Council are to:

- provide effective leadership based on an ethical foundation;
- ensure that a public higher education institution is seen to be a responsible corporate citizen;
- ensure that public higher education institutions' ethics are managed effectively;
- act as the focal point for and custodian of governance in the institution;
- understand that strategy, risk, performance and sustainability are inseparable;
- ensure that there is an effective and independent audit committee;
- be responsible for the governance of risk, ensure that there is an effective risk-based internal audit and report on the effectiveness of public higher education institutions;'
- ensure systems of internal controls;
- ensure that the institution’s assurance services and functions enable an effective control environment;
- be responsible for ~~information technology (IT)~~ technology and information governance;
- comply and ensure compliance with the laws;
- ensure that the institution remunerates its employees fairly, responsibly and transparently;

[86] *King IV* Principle 1.

[87] *King IV* principle 3.

- ~~appreciate that stakeholders' perceptions affect public higher education institutions' reputations;~~ ensure that the institution adopts a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interests of the institution;
- promote responsible investment;
- promote good governance and the creation of value by the companies in which it invests;[88]
- ensure the integrity of public higher education institutions' integrated report; and
- act in the best interests of public higher education institutions.[89]

The promotion of economy, efficiency, effectiveness and ethical behaviour in accordance with relevant legislation depends on adequate management measures for, amongst others, the planning, budgeting, authorisation, control and evaluation of the procurement and utilisation of resources. At the same time, it is essential for every public higher education institution to maintain the quality of its primary activities of education (teaching and learning) and research.

It has become important for public higher education institutions' information systems to support 'best practices' in general and sound financial management. In respect of the latter, it is necessary to facilitate more flexible financial planning and reporting processes in order to enable the management of a public higher education institution to budget, allocate and employ its financial resources to the best advantage of the institution and with the minimum of restrictions.

It is the responsibility of a Vice-Chancellor, through the executive management team, to institute these management and operational measures.

It is the responsibility of the Council to ensure that an institution's primary operations, and its management and administration, function accordingly.[90]

5. GOVERNANCE COMPLIANCE

Although fiduciary duties and the duty of care and skill exist in terms of the common law, it is important that Council members and the executive

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[88] *King IV* principle 17, this is important where institutions invest in commercial companies.

[89] Summary of *King IV*, principle 1 – 17.

[90] This paragraph is in accordance with the *2014 Reporting Regulations* 15 – 16.

management be aware of the duties that they owe to the institution. Furthermore, this paragraph must also be aligned with *King IV*.[91] The following amendments are suggested with regards to governance compliance:

> The Council is responsible for governance, and Executive Management is responsible for the effective management and administration of the institution. Both the Council and the executive management owe fiduciary duties and duties of care and skill towards their institution. The Council is responsible for governance, while the executive management is responsible for effective and ethical management and administration of the institution. The integrated annual report should show how, and ~~to~~ the extent to which, the Council and executive management have discharged these responsibilities. ~~King III contains a set of recommendations for listed companies. In regard to listed companies King IIIrecognizes that there is no "one size fits all" set of rules. For that reason, it sets out its recommendations and invites all organisations to consider these. Listed companies are required to follow and "apply or explain" governance framework; where the board does not accept a recommendation, the onus is on the board to explain (to itself and to its shareholders" why it does not. University Councils of public higher educations are encouraged to do the same as appropriate to the size, nature and complexity of their organization.~~ King IV contains a list of recommended principles and practices for all organisations, including higher education institutions. King IV advocates an 'apply and explain' approach. Therefore, all public higher education institutions must apply this approach in their organisation as appropriate to the size, nature and complexity of their institution.
>
> In reporting, each institution:
>
> (a) ~~Is encouraged to~~ must comply with relevant standards of accountability for governance and management as recommended by ~~King III~~ King IV; and
>
> (b) In its financial reporting is required to comply with the standards as codified in the International Financial Reporting Standards (IFRS), though the form and presentation of an annual report must be adopted to acknowledge the different purposes for which funds are held and used in public higher education institutions, including transparent reporting for loans provided by the institutions to commercial companies in which the institutions hold interest.[92]

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[91] *King IV* is discussed in Chapter 4, para 4.4.3 above.

[92] See Chapter 4, para 4.4.4 above. This paragraph is in accordance with the *2014 Reporting Regulations* 17.

6. ACCOUNTABILITY

It is critical that both Council members and members of the executive management to understand that they are accountable for their actions and decisions. Furthermore, their duties must be exercised in terms of a delegation of authority. It is also necessary to align this paragraph with the principles of *King IV*. The following recommendations are made below with regards to the accountability paragraph:

> Individuals or groups of individuals who assume fiduciary and/or managerial responsibilities by means of mandates or delegated powers are responsible for giving regular account of the results of exercising those powers. In discharging this obligation, it is essential that this form of reporting not be restricted to events, facts and achievements in abstract terms, but provides the means whereby these can be assessed and measured against projected outcomes, plans and targets.
>
> Council members and members of the executive management must exercise their duties in terms of the delegation of authority approved by the Council. Each Council member as well as members of the executive management must exercise their duties with the necessary accountability.
>
> In public higher education institutions, the following delegated powers and responsibilities are provided for in terms of the Higher Education Act of 1997 (as amended):
>
> - The duly constituted Council:
>
> The Council must govern a public higher education institution, subject to the Higher Education Act, section 27 (1) – (~~9~~ 12) and the institutional statute.[93]
>
> - The duly constituted Senate:
>
> The Senate is accountable to the Council for the academic and research functions of a public higher education institution and must perform such other functions as may be delegated or assigned to it by the Council in terms of section 28 (1) – (4), and
>
> as the core function of a public higher education institution is teaching and research, the Senate's responsibility for this and for sustainability is significant.

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[93] Recommendations to amend s 27 were made above to include more sub-sections; therefore, this paragraph must be amended accordingly.

- The duly appointed Vice-Chancellor:

  The Vice-Chancellor is responsible for the management and administration of a public higher education institution in terms of section 30.

  Management and administration will encompass risk and opportunity management; the governance of ~~information technology~~ technology and information; compliance; risk-based internal audit and integrated reporting in line with the relevant provisions of King IV.

- The duly appointed Institutional Forum:

  The Institutional Forum of a public higher education institution must advise the Council on issues affecting the institution; and perform such functions as determined by the Council in terms of section 31. The Council must consider the advice provided by the institutional forum and provide written reasons if the advice is not accepted.[94]

  Each of these structures and the Vice-Chancellor has the obligation to account for their actions under their mandates in a transparent way.[95]

7. CONTENT AND FORMAT OF ANNUAL REPORTS

The introduction to this paragraph as well as the provisions of paragraph (a) in respect of the performance assessment report are, in the author's view, clear and should be retained, except that references to *King III* should be replaced by *King IV*. It is recommended that the content and format of the annual reports which include the reports on governance, must comply with the recommendations of *King IV* and the principles of good governance and compliance, as indicated below. Furthermore, an additional report relating to the interest held by institutions in companies should also be required. It is therefore recommended that this paragraph be amended as follows:

> The following is a representation or example of the content and format of the Annual Report that each public higher education institution is required to submit.

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[94] See Chapter 2, para 2.3.2(b.3) for a discussion of the institutional forum. This recommendation is made in terms of section 31(1A), which now provides for this requirement.

[95] This paragraph is in accordance with the *2014 Reporting Regulations* 17 – 18.

~~References in bold type are to page numbers in the King III published report.~~ References in bold type are to the principles of *King IV*. All public higher education institutions ~~are expected~~ ~~to~~ must comply with its applicable recommendations. The various references are for the reader's convenience and are not intended to convey the only content of the report that is applicable to a public higher education institution.

The reports on governance and operations must comprise of the following:

- Performance assessment report;
- Report by the Chairperson of the Council;
- Council's statement on governance;
- Council's statement on sustainability;
- Senate's report to the Council;
- Institutional Forum's report to the Council;
- Vice-Chancellor's report on management/administration;
- Report on internal administrative/operational structures and controls;
- Report on risk exposure assessment and the management thereof;
- Annual financial review;
- Report of the audit committee; ~~and~~
- Report on Transformation; and
- Report on the interest held by the institution in any commercial companies.

(b) Report of Chairperson of Council

Some amendments and additions are suggested here to ensure compliance with the principles of *King IV*.[96]

The Report of the Chairperson of Council would include: (~~King III Chapters 1-9~~ **King IV principles 1 – 17).**

This is an integrated report that conveys adequate and concise information about the operations of a public higher education institution, its sustainability and financial reporting. It ~~should~~ must include a performance review encompassing economic, social and environmental aspects, and should not confine itself to past issues but should provide forward looking information to place the reported results and performance in context and to show transparency;

~~King III~~ King IV recommends the following:

[96] See *King IV* principles 1 – 17. This is discussed in Chapter 4, para 4.4.3 above.

- Effective Ethical Leadership and Corporate Citizenship;
- Governance of Risk;
- Governance of ~~Information Technology~~; Technology and Information;
- Compliance with laws, codes, rules and standards and governance;
- ~~Governing Stakeholder Relationships~~; Stakeholder-inclusive relationships;
- Remuneration of Councilors dealing with the policies, appraisals and amounts and remuneration governance; and
- Assurance;

Council must report on risk management in its report and particularly with regard to the following:

- Council is required to make a statement on risk management wherein they comment on how a public higher education institution has dealt with the issue of risk management. It should provide a statement that the Council is responsible for the total process of risk management as well as forming its opinion on the effectiveness of the process. Council ~~should~~ must disclose the system that it has put in place to support its opinion, including independent and objective reviews of the risk management process within a public higher education institution.
- ……
- ……

Councils ~~should give due consideration and~~ must report on the following:

- ……
- ……
- ……
- A statement regarding how contracts are managed, the process of managing service level agreements and the monitoring of suppliers' performance and workplace ethics, including the implementation of penalties.
- A statement on whether or not there was any contravention of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA) relating to any corrupt activities in terms of contracts and tenders as contained in section 12 and 13 of PRECCA. In the event of any contravention of PRECCA, whether the institution has reported this in terms of PRECCA and what other measures were taken by the institution against any employee or Council member.
- Council ~~should~~ must indicate in this report the number of requests for information received and the reasons for refusals of relevant requests for information that were lodged with a public higher education institution in terms of the Promotion of Access to Information Act of 2000;
- ……
- Councils' reports must indicate the processes, procedures and systems that their institutions have implemented to safeguard

personal information in terms of the Protection of Personal Information Act of 2013.[97]

This report must be signed by the Chairperson of the Council.

(c) Council's statement on governance

(~~King III~~ King IV Code of Governance Principles)

A positive statement should be made where the Code of governance principles has been applied. ~~Where the Council decides not to apply a specific principle and/or recommendation, this should be fully explained.~~ It must further be explained how the principles were applied.[98]

The Council is required to provide an account of its governance by means of a separate governance statement, an example of which appears below, in which the detail of governance structures, responsibilities and procedures are provided.

Council must approve this statement ……[99]

(i) Council and Council Committees

(~~King III Chapter 1 principle 1.1~~ King IV Part 5.1 principle 1)

The following statement is provided to assist readers of the Annual Report to obtain an understanding of the governance structures and procedures applied by a public higher education institution's Council:

Each public higher education institution must comply with King IV. A public higher education institution is committed to the principles of ~~discipline~~, transparency, integrity, competence, independence, accountability, responsibility, fairness and social responsibility, as advocated in the King ~~III~~ IV Report. Accordingly, the Council endorses, and during the period under review has applied the Code of Practices and Conduct and the Code of Ethical Behaviour and Practice as set out in the King ~~III~~ IV Report. In supporting this Code, the Council recognises the need to conduct the business of a public higher education institution with integrity and in accordance with generally accepted practices. Monitoring the public higher education institutions' compliance with the Code forms part of the mandate of a public higher education institution's Audit Committee.[100]

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[97] This paragraph is in accordance with the *2014 Reporting Regulations* 19 – 21.

[98] Reference to the "apply or explain" approach has been deleted and replaced with the "apply and explain" in line with *King IV*; see Chapter 4, para 4.4.4 above.

[99] This paragraph is in accordance with the *2014 Reporting Regulations* 22.

[100] This paragraph is in accordance with the *2014 Reporting Regulations* 22.

Council
(~~King~~ ~~III~~ King IV ~~Chapter 1~~ Part 5.1 principle 1 – 3; ~~1.1; 2.16; 2.18; 2.22; 2.23~~ Part 5.3 principle 7; 8 and 9)

The Council must comprise~~s~~ academic and non-academic persons appointed in terms of the Statutes of a public higher education institution of whom the majority (at least 60 per cent) are neither employees nor students of the institution. (A list of Councillors with their representative constituency to be attached, indicating whether or not they are internal or external to the public higher education institution, as well as an arithmetic summary indicating the percentage of internal vs. external members to be shown).

The report should include a statement:

(a) that the role of the Chairperson of the Council is separate from the role of a public higher education institution's chief executive, the Vice Chancellor.
(b) on the proposed length of tenure of the Chairperson.

Matters reserved to the Councils for decision-making are set out in the Statutes of public higher education institutions by custom and in terms of the Higher Education Act (101 of 1997). The Council is responsible for the ongoing strategic direction of a public higher education institution, approval of major developments and the receipt of regular reports from management on the day-to-day operation of its business. The Council:

(a) meets four times a year and;
(b) has several committees, including a Remuneration Committee, a Finance Committee, a Risk Committee, a Council Membership Committee, Planning and Recourses committee, a Social and Ethics Committee, a Committee on Commercialisation and Innovation, an Information Technology Committee, a Governance and Compliance Committee and an Audit Committee.

In the event that there is no separate Risk Committee, there must be an explicit statement to this effect and clarification as to how Council addresses the issue of risk i.e. which committee of Council is tasked with addressing the issues of risk.

A list of Council and sub-committee meetings is attached on page xx. All of these committees are formally constituted with terms of reference and are comprised of a majority of members of the Council who are neither employees nor students of a public higher education institution. Each report must list the names of the members of these committees. The committees constituted in terms of these regulations must comply with principle 8 of King IV.

The Council should:

(a) indicate in this report that evaluation of the performance ~~appraisals~~ of the Council and its committees

has been conducted in compliance with principle 9 of King IV.
(b) include a table indicating the composition of the Council; length of service (including service on a previous Council of a public higher education institution merged to form a new institution) and age of each Councillor; which sub-committees they sit on; number of Council meetings and committee meetings held and their respective attendances at these meetings; and must declare any ~~significant~~ directorships held in companies.[101]

Remuneration Committee
(~~King III~~ King IV ~~Chapter 2 principle 2.25~~ Part 5.3 principle 8 recommended practices 65 – 67; and Part 5.4 principle 14)

The remuneration committee ~~should~~ must issue a remuneration report in compliance with King IV, principle 14, recommended practices 32, to explain a public higher education institution's remuneration ~~philosophy~~ policy and how it has been implemented. The remuneration policy must comply with King IV, principle 8, recommended principle 50. The remuneration committee would typically disclose the remuneration policies followed and the strategic objectives that it seeks to achieve. The committee typically explains the policy on base pay, including the use of appropriate benchmarks. A policy to pay salaries on average at above the median requires special justification.

The members of this committee must be non-executive members of the governing body, with the majority being independent non-executive members of the governing body.

The remuneration committee's specific terms of reference include direct authority for, or consideration and recommendation to the Council of, matters relating to:

- amongst others general staff policies, remuneration and prerequisites, bonuses, executive remuneration, members of Council remuneration and fees;
- service contracts and retirement funds including post-retirement medical aid funding;
- its overall role and associated responsibilities and functions;
- its composition, including each member's qualifications and experience;
- any external advisers or invitees who regularly attend committee meetings;
- the number of meetings held during the reporting period and attendance at those meetings; and

[101] This paragraph is in accordance with the *2014 Reporting Regulations* 22 -23.

- whether the committee is satisfied, that it has fulfilled its responsibilities in accordance with its terms of reference for the reporting period.[102]

The definition of gross remuneration is to be found in Section 1 of these Regulations. All components of this definition must be considered and reported on by the remuneration committee.

Any material payments that may be considered ex gratia in nature should be fully explained and justified.

Disclosure ~~is typically~~ must be made of the performance parameters in respect of performance bonuses and the methods of evaluation of performance and determination of such bonuses. Policies regarding executive service contracts ~~should~~ must be disclosed in the annual remuneration report, including the period of the contract and notice conditions.

The note to the annual financial statements which reflects executive remuneration together with the comparative figure for the prior year must be approved by the Remuneration Committee. This includes fees paid to Councillors and committee members.[103]

Audit Committee

(King IV ~~Chapter 3 principle 3.1; 3.2; 3.4; 3.7; 3.8; 3.9~~ part 5.3; principle 8, recommended practice 50 – 59;

The Council, operating through its Audit Committee, provides oversight of the reporting process as customised for the individual institution.

The Audit Committee, whose members must be independent, non-executive members of the Council ~~whose chairperson and Members must either be members of Council or not members of Council~~ but specialists in the field of financial literacy and skills, was established x (number) of years ago. ~~The Audit Committee has a minimum of x number of members. All members of the Audit Committee are~~ be ~~independent of the public higher education institution and are not employed by the public higher education institution~~. Members of the Audit Committee must have the following: combined qualifications and/or experience in business: X, Y, Z….

Both the internal and external auditors have unrestricted access to the Audit Committee, which ensures that their independence is in no way impaired. The Audit

[102] The recommended additions are in line with both *King IV* and support the terms of reference provided for in the *2014 Reporting Regulations.*

[103] This paragraph is in accordance with the *2014 Reporting Regulations* 23 – 24.

Committee must have unrestricted access to the Council. Meetings are held at least twice a year and are attended by the external and internal auditors and appropriate members of the executive management. The Audit Committee should meet annually with the internal and external auditors respectively, without the members of executive management being present, to facilitate an exchange of views and concerns that may not be appropriate for discussion in an open forum.[104] The Audit Committee operates in accordance with written terms of reference, confirmed by the Council, which provide assistance to the Council with regard to:

- ensuring compliance with applicable legislation and the requirements of regulatory authorities;
- consideration of sustainability matters in the integrated report;
- monitoring the appropriateness of a public higher education institution's combined assurance model;
- ensuring arrangements are in place for combined assurance and the Committee's views on its effectiveness;
- concluding and reporting to stakeholders on an annual basis on the effectiveness of internal financial controls;
- matters relating to financial and internal control, accounting policies, reporting and disclosure;
- reviews at least annually the internal auditor's assessment of risks and approves the internal audit plan to ensure that audits are appropriately conducted to mitigate the risks identified;
- reviewing the quality of the performance of the external auditor, with reference to audit quality indicators;
- monitoring compliance with internal and external audit policies;
- monitoring compliance with the Regulations;
- the activities, scope, adequacy and effectiveness of the internal audit function and audit plans;
- the assessment of all areas of financial risk and the management thereof;
- review/approval of external audit plans, findings, annual audit management letters, problems, reports and fees;
- discussing significant matters that the Audit Committee has considered in relation to the annual financial statements, and how these were addressed;
- providing its views on the effectiveness of the Vice-Chancellor and the arrangements for internal audit;
- providing its views on the effectiveness of the Chief Financial Officer / Deputy Vice-Chancellor (Finance) of the institution and the finance function;
- after due deliberation and discussion with the external auditors, recommends the annual financial statements to the finance committee;

[104] See *King IV* principle 8, recommended practice 58.

- follows up on a regular basis that all items raised in the annual audit management letter and interim internal audit reports are addressed, and that actions previously taken to address these issues are still in place and effective - including points raised in previous reports and deemed to have been previously resolved; so as to ensure that the problem has not recurred;
- review and recommend to the Council financial policies and any changes thereto;
- is responsible for ensuring that policies are in place to ensure the protection of a public higher education institution's assets from loss or unauthorised use and reporting to the Department on material losses arising from unauthorised or illegal actions and actions taken to remedy the situation. (Material meaning: Information is material if omitting it or misstating it could influence decisions that users make on the basis of financial information about a specific reporting entity). In other words, materiality is an entity-specific (i.e. determined by the Audit Committee or Council) aspect of relevance based on the nature or magnitude, or both, of the items to which the information relates in the context of an individual entity's financial report;
- in the event that a public higher education institution's audit report is qualified, the audit committee makes a statement to that effect and explains the reasons for the qualification and outlines in reasonable detail what actions have been implemented to ensure the immediate reversal of this state;
- in the event that a public higher education institution's audit report includes a statement of emphasis of matter, the audit committee makes a statement to that effect and explains the reasons for the statement of emphasis of matter and outlines in reasonable detail what actions have been implemented to ensure the immediate reversal or correction of this state;
- compliance with a public higher education institution's Ethics and Corporate Citizenship initiatives (replacing the old "Code of Corporate Practices and Conduct");
- compliance with public higher education institution's Code of Ethics; and
- in the event of a public higher education institution having no credible internal audit function, an explicit statement as to this fact needs to be accompanied by how the audit committee have satisfied themselves that all the necessary controls and procedures have been adhered to.

A statement must be included to confirm that the Audit Committee is satisfied that the external auditor is independent of the institution. The statement should specifically address the following:

- the policy and controls that address the provision of non-audit services by the external auditor, and the nature and extent of such services rendered during the financial year;
- the tenure of the external audit firm, and in the event of the firm having been involved in a merger or acquisition, the tenure of its predecessor firm must be included;
- the rotation of the designated external audit partner; and
- significant changes in the management of the organisation during the external audit firm's tenure which may mitigate the attendant risk of familiarity between the external auditor and the management.

The audit committee should disclose the following:

- its overall role and associated responsibilities;
- any external advisers or invitees who regularly attend committee meetings;
- key areas of focus during the reporting period;
- the number of meetings held during the reporting period and attendance at those meetings;
- whether the committee is satisfied that it has fulfilled its responsibilities in accordance with its terms of reference for the reporting period.[105]

The composition of the committee, with academic qualifications, to be attached indicating internal or external to a public higher education institution and the period for which they have served. An arithmetic summary indicating the percentage of internal vs. external members (to be shown) as well as the number of meetings held and members' attendances.[106]

Risk Committee
(King IV ~~Chapter 3 (3.8) and Chapter 4 (4.1; 4.2; 4.3; 4.6; 4.8; 4.9~~ Principle 8, recommended practice 50, 65 – 67, Part 5.4, Principle 11, recommended practices 1 - 9)

Each public higher education institution ~~should~~ must have a risk committee in some form. The risk committee may be combined with the audit committee. In the event that the risk committee and the audit committee are separate, the institution should consider one or more members to have joint membership of both committees. The chairperson of this committee must be an independent, non-executive member. The risk committee considers all issues of risk which may result in some form of exposure for a public higher education institution and not just

[105] This is in accordance with *King IV* principle 8, recommended practice 50. See Chapter 4, para 4.4.3(b) for a discussion of the audit committee.

[106] This is in accordance with the *2014 Reporting Regulations* 24 26.

financial risk. The Council's integrated report will indicate how this committee is constituted and its reporting line.

The risk committee must maintain a reporting system that enables it to monitor changes in a public higher education institution's risk profile and gain an assurance that risk management is effective.

The risk committee establishes materiality levels and determines a public higher education institution's risk appetite. It then considers all possible risks, their likelihood, and where applicable, establishes risk mitigation procedures. They also ensure that there is a risk management system, and a risk register is maintained. The register is constantly monitored and updated.

NB: Relevant detail of all other Council sub-committees concerned with strategic, policy or financial matters are typically included.

The committee should disclose the following:

- its overall role and associated responsibilities;
- its composition, including each member's qualifications and experience;
- any external advisers or invitees who regularly attend committee meetings;
- key areas of focus during the reporting period;
- the number of meetings held during the reporting period and attendance of those meetings;
- whether the committee is satisfied that it has fulfilled its responsibilities in accordance with its terms of reference for the reporting period.[107]

~~IT~~ Technology and information governance committee (King IV, part 5.4, principle 12, recommended practice 10 – 17)

~~This would typically include the following:~~ This committee would be responsible for the following:

- statement that the Council is responsible for technology and information ~~the information technology (IT~~) governance and how the Council has fulfilled this role; and that management is responsible for the implementation of a ~~IT~~ technology and information governance framework;
- comments on the alignment of ~~IT~~ information technology with the performance and sustainability objectives of the public higher education institution;
- ~~comments~~ Confirmation that the Council monitors and evaluates significant ~~IT~~ information technology investment and expenditure;

[107] This is in accordance with *King IV*, principle 8, recommended practice 50. See Chapter 4, para 4.4.3(c) for a discussion of risk governance. See further the *2014 Reporting Regulations* 26 – 27.

- how ~~IT~~ information technology is an integral part of the public higher education institution's risk management;
- monitoring that ~~IT~~ information technology assets are managed effectively; and
- comments ~~that/how~~ on how the Risk Committee and Audit Committee (if/as appropriate) assist the Council in carrying out its ~~IT~~ information technology responsibilities.
- integration of people, technologies, information and processes across the organisation;
- integration of technology and information risks into organisation-wide risk management;
- proactive monitoring of intelligence to identify and respond to incidents, including cyber-attacks and adverse social media events;
- management of the performance of, and the risks relating to, third-party and outsourced service providers;
- the assessment of value delivered to the organisation through significant investments in technology and information, including the evaluation of projects throughout their life cycles and of significant operational expenditure;
- the responsible disposal of obsolete technology and information in a way that has regard to environmental impact and information security;
- ethical and responsible use of technology and information;
- compliance with relevant laws;[108]

The following should be disclosed in relation to technology and information:

- an overview of the arrangements for governing and managing technology and information;
- key areas of focus during the reporting period, including objectives, significant changes in policy, significant acquisitions and remedial actions taken as a result of major incidents;
- actions taken to monitor the effectiveness of technology and information management and how the outcomes were addressed; and
- planned areas of focus.[109]

The committee should disclose the following:

- its overall role and associated responsibilities;
- its composition, including each member's qualifications and experience;
- any external advisers or invitees who regularly attend committee meetings;

[108] This is in accordance with *King IV,* principle 12, recommended practice 13.

[109] This is in accordance with *King IV* principle 12, recommended practice 17.

- key areas of focus during the reporting period;
- the number of meetings held during the reporting period and attendance at those meetings;
- whether the committee is satisfied that it has fulfilled its responsibilities in accordance with its terms of reference for the reporting period.[110]

The following new committees are recommended and should be added to the revised Reporting Regulations:[111]

Committee on commercialisation and innovation

A mandatory Council committee must be established to deal with all matters relating to commercialisation and innovation, including the registration of companies or the buying of shares in such companies.[112]

The membership of this committee should comprise members of the executive management of the higher education institution, members of the technology transfer office of the institution as well as external members with the required business, financial and legal expertise.

This committee will be responsible for the following:

- protecting the commercial interests of the institution as well as the intellectual property rights of the institution. This will include generating third stream income to supplement government funding received by the institution;
- making recommendations relating to the incorporation of companies to assist the institution in carrying out its responsibilities;
- ensuring that companies are not registered for the sole purpose of housing intellectual property that was created within the institution, thereby contravening the Intellectual Property Rights from Publicly Financed Research and Development Act of 2008;

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[110] This is in accordance with *King IV* principle 8, recommended practice 50. See Chapter 4, para 4.4.3 (c) for a discussion of technology and information. See the *2014 Reporting Regulations* 27.

[111] These should be inserted after "technology and information committee" on page 27 of the *2014 Reporting Regulations*.

[112] In terms of s 6 of the Intellectual Property Rights from Publically Financed Research and Development Act of 2008 (IPR Act), each public higher education institution must establish an office of technology transfer. The latter office is responsible for undertaking the obligations of the institution in terms of the IPR Act. Section 7(1) confirms that the function of this office must be performed by appropriately qualified personnel who have interdisciplinary knowledge, qualifications and expertise in the identification, protection, management and commercialisation of intellectual property and intellectual property transactions. Section 7(2) provides a list of functions that this office must attend to. See para 6.3.3 (principle 9) below concerning the proposed regulations for companies registered by public higher education institutions.

- ensuring that proper policies and procedures are in place with regards to any commercial and innovation activities;

The committee should disclose the following:

- its overall role and associated responsibilities;
- its composition, including each member's qualifications and experience;
- any external advisers or invitees who regularly attend committee meetings;
- key areas of focus during the reporting period;
- the number of meetings held during the reporting period and attendance at those meetings;
- whether the committee is satisfied that it has fulfilled its responsibilities in accordance with its terms of reference for the reporting period.[113]

Social and ethics committee
(King IV part 5.3, principle 8, recommended practice 50, 68 – 70)

It is a requirement for all public higher education institutions to establish a social and ethics committee, either as a standalone committee or as part of another committee.

The members of this committee must comprise both internal and external members, with a majority being external members of the institution.

The committee will be responsible for the following:

- upholding, monitoring and reporting on organisational ethics, responsible corporate citizenship, sustainable development and stakeholder inclusivity;[114]
- monitoring the university's activities with regard to legislation, relevant legal requirements and prevailing codes of best practices in social and economic development;
- good corporate citizenship, the environment, health and public safety;
- consumer relationships with students and labour and employment to draw matters within its mandate to the attention of the university Council and management;
- reviewing and enforcing policies and procedures as far as possible and reporting to the Council on a regular basis on matters within its mandate and especially drawing Council's attention to any risks that have been identified.[115]

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[113] This is in accordance with *King IV* principle 8, recommended practice 50.

[114] *King IV* 47.

[115] See Chapter 4, para 4.4.3(b) for a discussion of the social and ethics committee.

The committee should disclose the following:

- its overall role and associated responsibilities;
- its composition, including each member's qualifications and experience;
- any external advisers or invitees who regularly attend committee meetings;
- key areas of focus during the reporting period;
- the number of meetings held during the reporting period and attendance at those meetings;
- whether the committee is satisfied that it has fulfilled its responsibilities in accordance with its terms of reference for the reporting period.[116]

Tender and procurement committee

Each public higher education institution must have a tender and procurement committee. Separate procurement and tender committees may be provided for, but policies and procedures for both procurement and tenders must be provided for, and these documents must be available to the public to ensure transparency.

The tender and procurement committee will be responsible for the following:

- credible, fair, equitable and transparent policies and processes relating to the awarding of tenders;
- a clear procurement process for becoming a vendor at the institution;
- declarations of any conflicts of interest during the tender and procurement processes;
- the process to be followed in the event of approval of a preferred service provider;
- ensuring that the correct documents and contracts are used during each of the processes;
- confirming the signature authority for both tender and procurement contracts;
- confirming the correct process for the issuing of a purchase order;
- confirming the purchasing thresholds;
- confirming the process for obtaining quotations;
- confirming the process for removing suppliers from the database, which must be in accordance with the Promotion of Administrative Justice Act 3 of 2000;
- confirming the meeting processes for both the tender and procurement committees, including the number of meetings to be held annually, the process to be followed in the event of an emergency procurement, compliance with the Broad-Based Black Economic Empowerment Act No. 53 of 2003 (B-BBEE Act), Broad-Based Black Economic Empowerment Amendment Act No 46 of

[116] This is in accordance with *King IV*, principle 8, recommended practice 50.

2013 and the Prevention and Combating of Corrupt Activities Act No. 12 of 2004.

The committee should disclose the following:

- its overall role and associated responsibilities;
- its composition, including each member's qualifications and experience;
- any external advisers or invitees who regularly attend committee meetings;
- key areas of focus during the reporting period;
- the number of meetings held during the reporting period and attendance at those meetings;
- whether the committee is satisfied that it has fulfilled its responsibilities in accordance with its terms of reference for the reporting period.[117]

Governance and compliance committee

It is recommended that a governance and compliance committee be established in each public higher education, either as a standalone committee or combined with another committee.[118] It is recommended that this committee meet at least four times a year. The members of this committee should include the governance or compliance professionals of the institution, member(s) of Council, member(s) of the audit and risk committee and a member of the social and ethics committee.

The terms of reference of the governance and compliance committee should include the following:

- to review overall governance effectiveness and efficiency and recommend improvements, including improvements to the council's operations;
- to review governance-related policies of the institution and make recommendations to Council in this regard;
- to advise on and approve orientation programmes as well as ongoing training on good governance of Council and executive management members;
- to develop, implement and monitor procedures for assessing the effectiveness of governance processes in the institution;
- to provide guidance to Council and executive management;
- to review and recommend improvements with regards to compliance, ensure that all members of the committee keep up to date with compliance with legislation and policies and to make recommendations in this regard to Council; and

[117] This is in accordance with *King IV*, principle 8, recommended practice 50.

[118] See the York University's Terms of Reference and Mandate for their Governance and Human Resources Committee.

- to identify any risks that might occur and report to both the risk management committee as well as to council.

The committee should disclose the following:

- its overall role and associated responsibilities;
- its composition, including each member's qualifications and experience;
- any external advisers or invitees who regularly attend committee meetings;
- key areas of focus during the reporting period;
- the number of meetings held during the reporting period and attendance at those meetings;
- whether the committee is satisfied that it has fulfilled its responsibilities in accordance with its terms of reference for the reporting period.[119]

(iv) Statement on Code of Ethics
(King IV: ~~Chapter 1, principle 1.1~~ part 5.1, principle 2, recommended practices 4 - 10)

The Code of Ethics commits a public higher education institution to the highest standards of integrity, behaviour and ethics in dealing with all its stakeholders, including its Council members, managers, employees, students, customers, suppliers, competitors, donors, and society at large. Council members and staff are expected to observe the institution's ethical obligations in order to conduct its business through the use of fair commercial competitive practices.

The Council should ensure that its codes of conduct and ethics policies:

- encompass the institution's interaction with both internal and external stakeholders as well as broader society; and
- address the key ethical risks of the institution.

The Council must ensure that the codes of conduct and ethics policies provide for arrangements that familiarise employees and other stakeholders with the institution's ethical standards. These arrangements include:

- publishing the institution's codes of conduct and policies on the organisation's website or on other platforms or through other media as appropriate;
- incorporating by reference or otherwise, the relevant codes of conduct and policies in supplier and employee contracts; and
- including the codes of conduct and ethics policies in employee induction and training programmes.

[119] This is in accordance with *King IV*, principle 8, recommended practice 50.

The Council must exercise ongoing oversight of the management of ethics and ensure that it results in the following:

- application of the institution's ethical standards to the processes for the recruitment, evaluation of performance and reward of employees as well as the sourcing of suppliers;
- having sanctions and remedies in place when the institution's ethical standards are breached;
- using protected disclosure or whistle-blowing mechanisms to detect breaches of ethical standards and dealing with such disclosures;
- monitoring adherence to the institution's ethical standards by employees and other stakeholders through, among others, periodic independent assessments.

The statement should contain the following information:

- an overview of the arrangements for governing and managing ethics;
- key areas of focus during the reporting period;
- measures taken to monitor the institution's ethics and how the outcomes were addressed; and
- planned areas of future focus.

The Council reviewed the Code of Ethics in the year under review at its meeting of dd/mm/yyyy, which meeting quorate and the documentation for approval by the Council was circulated with the meeting agenda in advance with due notice.

The wording used in the above examples should be adapted to the circumstances applicable to individual institutions.

The Council must approve the above statements.

f) Institutional Forum's report to the Council

The content of the report will depend on the activities of the Institutional Forum as stipulated in the institutional statute. The report of the Institutional Forum ~~should~~ must include all instances of advice sought by and advice given to the Council by the Institutional Forum. Council must consider the advice and provide written reasons if the advice is not followed.[120] The composition of the forum ~~should~~ must be listed. The report must specify how often they met.[121]

[120] Section 27(1A) of the Higher Education Act of 1997, as amended by s 9 of the Higher Education Amendment Act of 2016.

[121] This paragraph is in accordance with the *2014 Reporting Regulations* 29 – 30.

g) Vice-Chancellor's Report on management / administration
(King III~~: Chapters 8 and 9~~ IV part 5.2, principle 4, recommended practices 1 – 8; principle 5 recommended practices 9 – 15; part 5.5, principle 16, recommended practices 1 – 5)

No changes are recommended to this paragraph, except to align it with *King IV*.[122]

h) Report on internal administrative/operational structures and controls
(King III~~: Chapters 5, 7 and 9~~ King IV, part 5.2, principle 4, recommended practice 9 – 15; part 5.4, principle 12 recommended practice 10 – 17; principle 15, recommended practice 48 – 61)

No changes are recommended to this paragraph, except to align it with *King IV*.[123]

i) Report on risk exposure assessment and the management thereof
(King III~~: Chapter 4~~ IV, part 5.4, principle 11, recommended practices 1 - 9)

No changes are recommended to this paragraph, except to align it with *King IV*.[124]

j) Annual financial review - Report by the Chairperson of the Finance Committee and the Chief Financial Executive

No changes are recommended to this paragraph, except to align it with *King IV* [125]

k) Report of the Audit committee

The following elements of Audit Committee's reporting duties are dealt with in **~~Chapter 3 of :~~ King IV, part 5.3, principle 8, recommended practice 51 – 59**

- The Audit Committee should satisfy itself as to the expertise, resources and experience of the ~~company's~~ institution's finance function. Results of the review should be disclosed;
- The Audit Committee should report internally to the Council on its statutory duties and duties assigned to it by the Council;

[122] This paragraph is in accordance with the *2014 Reporting Regulations* 30.

[123] This paragraph is in accordance with the *2014 Reporting Regulations* 30 – 32.

[124] See the *2014 Reporting Regulations* 32 – 33.

[125] See *2014 Reporting Regulations* 34 – 35.

The Audit Committee should report on its statutory duties:

- how its duties were carried out;
- if the committee is satisfied with the independence of the external auditor;
- the committee's view on the financial statements and the accounting practices;
- whether the internal financial controls are effective; and
- internal audit functions.

The Audit Committee should provide a summary of its role and details of its composition, number of meetings and activities; and

The Audit Committee should recommend the integrated report for approval by the Council.

This report must be signed by both the Chairperson of the Audit Committee and Chairperson of Council

The international comparison that was done with the state of Georgia in the USA included a review of the Georgia Board of Regents' ethics and compliance programme.[126] It is the author's view that a similar programme should be established by the DHET. The DHET needs to establish an office responsible for overseeing and implementing this programme. The compliance officers in this office should also be responsible for conducting compliance and ethics investigations at public higher education institutions where non-compliance has been detected.[127] It is not the intention of this recommendation that the DHET be directly responsible for compliance, but rather that this office at the DHET will assist and oversee the programme. This will in then in turn lead to better governance and compliance. As part of the mandate of this office, the annual reports of each public university must be verified to ensure compliance with the provisions of the *2014*

[126] See information relating to the Georgia Board of Regents ethics and compliance programme on https://www.usg.edu/organizational_effectiveness/ethics_compliance (Date of use: 30 January 2019); also see Chapter 5, para 5.5.1(c) for a discussion of this programme.

[127] See the University System of Georgia's "Compliance and Ethics Charter" https://www.usg.edu/assets/organizational_effectiveness/documents/2018_USG_Compliance_and_Ethics_Charter.pdf (Date of use: 7 September 2018).

Reporting Regulations. It is recommended that the following article be added to the *Reporting Regulations.*[128]

> **8. Ethics and compliance programme**
>
> In order for the DHET to assist higher education institutions to achieve the highest level of compliance and ethics, it is recommended that an ethics and compliance programme be introduced. The functions of this programme would be the following:
> - promoting the highest level of ethical conduct in public higher education institutions;
> - coordinating and supporting institutional ethics and compliance functions;
> - ensuring compliance with all relevant legislation, regulations and policies; and
> - conducting compliance investigations as needed.
>
> The objectives of this programme should be the following:
>
> - identifying legislation, codes of conduct, policies and regulations that affect higher education institutions;
> - assisting higher education institutions to achieve their compliance and ethics goals by identifying non-compliance and providing the institution with an opportunity to become compliant;
> - ensuring that the responsibility of compliance is delegated to competent employees and that Council train relevant employees to empower them to achieve optimal compliance and ethical standards.[129]

9. Reporting by public higher education institutions on their interests held in commercial companies

(a) General

The DHET and higher education institutions have agreed to disagree on whether or not higher education institutions may form or participate in commercial companies. The DHET is of the opinion that the universities should not be allowed to form or participate in these companies since most

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[128] This should follow "report on transformation" on page 35 of the *2014 Reporting Regulations*.

[129] See the University System of Georgia's "Compliance Policy" https://www.usg.edu/organizational_effectiveness/ethics_compliance (Date of use: 7 September 2018).

of these companies have an educational component and should, therefore, be registered as private higher education institutions. Furthermore, the DHET believes that funding and resources earmarked for public higher education institutions are being used for these companies.[130] However, public higher education institutions and the USAf are of the opinion that there is nothing in the Higher Education Act of 1997 that prohibits these institutions from participating in and/or incorporating both for-profit and not-for-profit companies for various business ventures.[131] The public institutions and USAf agree that public institutions have vast intellectual capital and that it is imperative that this capital be mobilised in a manner that is fair, equitable and sustainable for the benefit of the public higher education institution concerned. There is, on the one hand, a need to identify and exploit alternative economic resources to sustain public higher education institutions. On the other hand, there is a need for these institutions to mitigate the risks associated with various business ventures. Thus, according to the public higher education institutions and USAf, the solution is to establish separate legal entities in the form of companies. The assets of the public higher education institution will then not be at risk.[132] According to the public higher education institutions, these business ventures would not only assist with teaching, learning and innovation but would also create much needed third-stream income. Further to establishing commercial entities to generate third-stream income and to participate in research and innovation, these public institutions want to commercialise intellectual property. The author is of the opinion that intellectual property created in a public higher education institution should

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[130] It is not suggested that higher education institutions should micro manage the governance of these companies. The intention is to recommend that higher education institutions, as publically funded institutions, should report to the DHET on any interest held in commercial companies.

[131] HESA's Legal Advisory Committee memorandum to the DHET dated 23 September 2014. This memorandum was supplied to the author by Prof Chris de Beer. HESA's name has now changed to USAf.

[132] HESA's Legal Advisory Committee memorandum to the DHET dated 23 September 2014.

be commercialised for the benefit of the institution within the institution and not through a separate juristic entity.

The DHET should reconsider its position on the registration of private companies by public higher education institutions. The author agrees that some of these private companies have an educational and research aspect to them and must therefore be registered as private higher education institutions in compliance with the Higher Education Act of 1997. However, there are other such companies that focus on development and commercialisation, which may result in the creation of third stream income for these institutions. It is the author's opinion that provided they are regulated to ensure that public money is not mismanaged, these companies have an important role to play in public higher education institutions. It is recommended that the Minister of Higher Education and Training should consider imposing a requirement on public institutions to report any interests held in commercial companies as well as any loans provided to these commercial entities. Ignoring this increasing trend at universities will exacerbate the ongoing governance problems, especially with regard to the use of public university resources. Some institutions provide loans to these companies as well as allowing them to use the institutions' infrastructure and human resources because they cannot afford their own.

A recent forensic investigation into certain commercial activities at the University of Johannesburg (UJ) led to the dismissal and prosecution of senior executives. This highlights the need for the improvement of governance practices of higher education institution and commercial companies in these situations.[133] Two senior members[134] of UJ have stepped

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[133] See Chapter 4, para 3.3.2(a) above where this matter is discussed. The recent commercialisation failures at the University of Johannesburg came under scrutiny during 2017 when two senior university officials had allegedly personally benefited from commercial activities of the University. See Seale L "Senior managers accused of swindling UJ face the axe" 2017-09-24*Sunday Independent*.

[134] Some of these allegations include that the two senior officials used UJ companies to personally benefit from contracts and projects. The University of Johannesburg confirmed that it had established a commercialisation unit to provide a third stream of

down from their positions following a forensic investigation that indicated their involvement in fraudulently obtaining R30 000 000 from the university to benefit their own business.[135] The investigation was initiated after fraud allegations were made against the former chairperson of Council and a member of the executive management of UJ, who allegedly abused their positions to channel money earmarked for the institutions into commercial companies in which they held interests but which they failed to declare to the institution. Although the funds were fraudulently obtained, there were also indications of non-compliance with several institutional policies and procedures.[136] Although this investigation relates to fraudulent activities, the lack of proper governance practices and oversight possibly made it easier for the individuals to commit the fraudulent acts.

It is recommended that the *2014 Reporting Regulations* be amended to include a requirement that public higher education institutions report on their interests in commercial companies. The following insertion is recommended:[137]

> All public higher education institutions must declare the following information in their annual reports in relation to any interest it holds in commercial companies:
> - any shareholding in all companies in which they hold interest;

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income through the patenting and licensing of inventions. Section 69(8)(b)(iii) of the Companies Act of 2008 provides that a person is disqualified from acting as a director of a company if such a person has been removed from an office of trust on the grounds of misconduct involving dishonesty.

[135] Seale L "High-ranking UJ Leaders Accused of Swindling R25m" 2017-07-01*Independent Online.* On 1 August 2017, students from the University of Johannesburg proceeded to lay criminal charges against these individuals; see *ENCA* "Fraud Charges against UJ Staffers" 2017-08-01; *News24* "Two UJ Council Members Implicated in alleged R25m Fraud" 2017-08-01.

[136] The matter is also currently being investigated by the Hawks. See in general, Nkosi B "UJ retrieves stolen R14m from execs" 2018-08-08 *The Star;* Nkosi B "Hawks to Zoom in on UJ Fraud Suspects" 2018-06-01 *The Star The Citizen* "R14 m Stolen by UJ Executives to be Recovered" 2018-08-08 See Chapter 3, para 3.4.2(a) above for a discussion on this matter.

[137] This must follow after para 8 "ethics and compliance" programme in the *2014 Reporting Regulations*.

- the composition of the board of directors of each of these companies, and state whether they are executive or non-executive directors;[138]
- whether or not any loans were provided to any of these companies and if so, the amount of the loan;[139] and
- whether or not any of the public higher education's infrastructure, equipment or human resources are used to assist these companies, and if so the period for which it will be used.[140]

6.5 CONCLUSION

Since the attainment of democracy in South Africa, the higher education landscape has been subject to continuous revision and is in need of further improvement. Although these suggested amendments might not have completely prevented fraudulent activities at the universities that was researched for this thesis, but it would have made it harder to commit fraud and easier to detect these types of activities. Furthermore, earlier detection could have lessened the detrimental effect on these institutions, and would have ensured accountability for the errant individuals. However, in the author's opinion, the improvement of governance-related aspects has not been prioritised, given the many other matters requiring attention. A lack of proper governance and compliance has been confirmed following investigations and administrations of various higher education institutions. Some of the amendments brought about by the Higher Education and

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[138] This declaration is relevant, as it will indicate whether the board of directors is constituted only of university employees or whether there is a balance between university employees and external appointments. In the event of the board being solely constituted of university employees, a conflict of interest can easily arise, as it will not always be possible act in the interests of the company as director and in the best interests of the university as employee.

[139] Declaring this information is very important as public higher education institutions receive public funding. If they use this public funding to provide loans to a company, it must be declared. This declaration will also indicate how many loans were provided for these companies.

[140] The relevance of this declaration is that the use of the university's infrastructure, equipment and human resources is an additional expense to the university and must be declared. These companies should not use the infrastructure, equipment or human resources of the university for a prolonged period. By declaring this on a yearly basis, it will be clear whether the company is sustainable after a certain period or whether public money is being used in a wasteful manner.

Training Laws Amendment Act of 2012 threatened institutional autonomy by providing the Minister with more powers to intervene in the affairs of a public higher education institution. The Higher Education Amendment Act of 2016 is commended for its attempts to address the concerns raised by the various higher education stakeholders. Despite these initiatives, this study has identified additional areas where governance practices in higher education could be improved. Recommendations have therefore been made, drawing on provisions in the Companies Act of 2008, the Banks Act of 1990, the regulation of higher education, corporate law and corporate governance in two selected foreign jurisdictions, as well as the provisions of *King IV*.

Specific amendments were suggested to the Higher Education Act of 1997 as well as the *2014 Reporting Regulations.* In my view, these amendments will improve the accountability of public higher education institutions and those responsible for their governance and management. The proposed amendments to the Higher Education Act of 1997 specifically provide for the duties of Council members and members of the executive management and their potential liability, removal of Council members and declaring Council members delinquent. It is hoped that the enforcement of these provisions will lead to greater accountability in public higher education institutions. The suggested recommendations for the *2014 Reporting Regulations* were aimed at clarifying any ambiguities in their interpretation, aligning the *Regulations* with *King IV*, providing for a compliance and ethics programme to be implemented by the DHET and requiring all public higher education institutions to report on any interests they hold in commercial entities.

The improvement of governance, compliance and accountability in public higher education institutions should lead to increased confidence in these institutions as custodians of public funding. It should also assist the institutions to fulfil their crucial role in providing tertiary education, in line

with the Constitution[141] and various policy documents like the *National Development Plan of 2030*[142] and the *African Agenda 2063: The Africa we want.*[143]

[141] See Chapter 2, para 2.2 above for a discussion of the Constitution in the post-1994 era.

[142] For more information on the National Development of 2030, see https://www.gov.za/issues/national-development-plan-2030

[143] For more information on Africa 2063, see African Union Commission (2013) https://au.int/en/agenda2063 (Date used: 25 February 2019), especially paragraphs FE (c) and (i).

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INTERVIEWS

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Prof Marie Muller – former Registrar of the University of Johannesburg.

Prof Chris de Beer – Member of the ministerial task team to investigate the amendments to the Higher Education Act of 1997 during 2014.

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